Supreme Court, U.S.
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In The

Supreme Court of the United States

OGLALA SIOUX TRIBAL PUBLIC SAFETY DEPARTMENT,

Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did Congress by the "notwithstanding" clause in 25 U.S.C. § 450j-1(b), avoid and in effect eliminate its contractual obligation arising from 25 U.S.C. §§ 450 *et seq.*, thereby vitiating the entire Indian Self-Determination Act?

PARTIES

The Oglala Sioux Tribal Public Safety Department is a division or department of the Oglala Sioux Tribe, a federally recognized Indian tribe.

TABLE OF CONTENTS

Page

PETITION FOR WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 1

STATEMENT OF JURISDICTION..... 1

STATUTORY AND REGULATORY PROVISIONS.... 1

STATEMENT OF THE CASE..... 2

A. Material Facts..... 3

B. Proceedings Below..... 4

REASONS TO GRANT THE PETITION 6

A. THE DECISION BELOW OVERTURNS THE FUNDAMENTAL POLICY OF FEDERAL-INDIAN RELATIONS 6

B. THE INTERPRETATION RUNS COUNTER TO ESTABLISHED RULES OF CONSTRUCTION ... 9

1. The Decision Misinterprets Plain Words 9

2. The Decision Vitiates The Legislative Scheme..... 12

3. The Decision Subverts Indian Policy And Violates The Canon Of Construction Favoring Indians..... 13

C. THE DECISION IS INCONSISTENT WITH THE REASONING OF OTHER CIRCUITS..... 15

D. THE DECISION RENDERS GOVERNMENT OBLIGATIONS SUSPECT..... 17

CONCLUSION 19

TABLE OF CONTENTS – Continued

Page

APPENDICES

A. Decision Below ..... App. 1

B. IBCA Decision in Appeals of Alamo-Miccosukee ..... App. 22

C. IBCA Order on Summary Judgment ..... App. 78

D. Indian Self-Determination Act, excerpts ... App. 83

E. Public Law 103-332 ..... App. 100

F. GAO Report: Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Needs To Be Addressed, U.S. General Accounting Office (June 1999) No. B-282458, Figure 2.5 ..... App. 102

G. BIA Work Group on Contract Support Costs No. 5 Report: "A Study of Contract Support Costs in The Bureau of Indian Affairs and Recommendations for Reform," June 1999, Figure, 4.8 .... App. 106

TABLE OF AUTHORITIES

Page

CASES:

American Tel. & Tel. Co. v. United States, 177 F.3d 1368 (Fed. Cir. 1999) 5, 11, 18

Amgen, Inc. v. U.S. Int'l Trade Com'n, 902 F.2d 1532 (Fed. Cir. 1990) 14

Blackhawk Heating & Plumbing, Inc. v. United States, 622 F.2d 539 (Ct. Cl. 1980) 9

Bryan v. Itasca County, 426 U.S. 373 (1976) 14

California Rural Indian Health Board, Inc. v. Shalala, No. C-96-3526 DLJ (N.D.Cal.) 6

Cherokee Nation v. United States, No. 99-092-S CIV (E.D.Okla.) (pending summary judgment) 6

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 14

Freytag v. Com'n of Internal Revenue, 501 U.S. 868 (1991) 18

Government Systems Advisors, Inc. v. United States, 847 F.2d 811 (Fed. Cir. 1988) 8

Jones v. Meehan, 175 U.S. 1 (1899) 14

Lynch v. United States, 292 U.S. 571 (1934) 17

McCarthy v. Bronson, 500 U.S. 136 (1991) 9

Morton v. Mancari, 417 U.S. 535 (1974) 11

Murray v. Charleston, 96 U.S. 432, 24 L. Ed. 760 (1877) 11, 18

TABLE OF AUTHORITIES – Continued

Page

New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966) 9, 13, 17

Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997), on remand *sub. nom.*, *Ramah Navajo Chapter v. Babbitt*, 50 F.Supp. 2d 1091 (D.N.M. 1999) 6, 15

Ramah Navajo School Board, Inc. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996) 4, 6, 15, 16

Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997) 9

Rubin v. United States, 449 U.S. 424 (1981) 12

Shoshone-Bannock Tribes v. Shalala, 988 F.Supp. 1306 (D. Or. 1997), *mod. oth. grnds*, 999 F.Supp. 1395 (D. Or. 1998) 6

South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986) 12, 14

TVA v. Hill, 437 U.S. 153 (1978) 13

United States v. Monia, 317 U.S. 424 (1943) 10

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 11, 12

United States v. Winstar, 518 U.S. 839 (1996) 18

West Virginia University Hospital v. Casey, 499 U.S. 83 (1991) 12

Wetsel-Oviatt Lumber Co. v. U.S., 38 Fed. Cl. 563 (1997) 9, 16

Worcester v. Georgia, 6 Pet. 515 (1832) 14

Yankee Atomic Electric Co. v. U.S., 112 F.3d 1569 (Fed. Cir. 1997) 17

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Anti-Deficiency Act, 31 U.S.C. § 1341 .....11, 16

Administrative Procedure Act, 5 U.S.C. §§ 553 *et seq.*..... 15

Indian Self-Determination and Education Assistance Act, as amended (ISDA), Public Law 93-638, 25 U.S.C. §§ 450-450n ..... *passim*

Interior Appropriations Act of 1995, Public Law No. 103-332, 108 Stat. 2499 (1994)..... 1

25 U.S.C. § 450..... 1, 2, 5

25 U.S.C. § 450a.....2, 13

25 U.S.C. § 450(b) 8

25 U.S.C. § 450f 2

25 U.S.C. § 450j-1(a) 11

25 U.S.C. § 450j-1(a)(2)..... 3, 7, 15

25 U.S.C. § 450j-1(b).....3, 9

25 U.S.C. § 450j-1(g).....3, 7

25 U.S.C. § 450*l*(c).....9, 10

25 U.S.C. § 450m-1(a)..... 7

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1295..... 4

Public Law 100-472.....2, 7

Public Law 103-322..... 3

Public Law 103-332..... 7

TABLE OF AUTHORITIES – Continued

Page

OTHER MATERIALS:

Honorable Felix Frankfurter in Memory of Felix Cohen, 9 Rutgers L. Rev. 355 (1954) 13

House Report No. 100-393 13

House Report No. 103-740 ..... 8, 12

Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Needs To Be Addressed, U.S. General Accounting Office (June 1999) No. B-282458 4

Report: A Study of Contract Support Costs in The Bureau of Indian Affairs and Recommendations for Reform," BIA Work Group on Contract Support Costs No. 5, June 1999 4

Senate Report No. 103-294 ..... 8, 12

Senate Report No. 274, 100th Cong., 2d Session, 1988 U.S.C.C.A.N. 2620 ..... 3, 6, 7

Special Message to the Congress on Indian Affairs, Pub. Papers 564 (Richard M. Nixon), 6 Pres. Doc. 894 (1970) 6

PETITION FOR WRIT OF CERTIORARI

The Oglala Sioux Tribal Public Safety Department petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this case on October 27, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 194 F.3d 1374 (Fed. Cir. 1999) (Appx. A). The summary judgment in favor of the Miccosukee Corporation which it incorporates is reported at IBCA 3463-3466, 3560-3562 (December 4, 1997) (Appx. B). The summary judgment in favor of Oglala Sioux Tribal Public Safety Department is reported at IBCA No. 3680-97, 98-2 BCA 29,833 (Interior BCA, June 24, 1998) (Appx. C).

STATEMENT OF JURISDICTION

The Court of Appeals for the Federal Circuit entered the judgment from which review is sought on October 27, 1999. (Appx. A) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The statutes involved are the Indian Self-Determination Act of 1975, 25 U.S.C. § 450 *et seq.*, as amended, (Appx. D) and the Interior Appropriations Act of 1995,

Public Law No. 103-332, 108 Stat. 2499, 2511 (1994) (Appx. E).

STATEMENT OF THE CASE

Self-determination is the basic policy of federal Indian law, replacing the discredited "termination policy" which removed federal recognition and forced assimilation of tribes in disregard of their history, cultural identity, and legal rights. The Indian Self-Determination and Education Act of 1975 ("ISDA"), 25 U.S.C. § 450 et seq., as amended, is the central expression of that policy. Its purpose is to allow Native American tribes to operate their own federal programs directly, under stable, predictable contractual funding. 25 U.S.C. § 450a.

ISDA directs the Secretary of Interior, on tribal request, to enter contracts to fund governmental programs. 25 U.S.C. § 450f. Pursuant to the 1988 amendments (Public Law 100-472) these contracts include funding of the overhead ("indirect costs" or "contract support costs") of these programs as well, at a rate determined by annual negotiations with the Office of Inspector General of the Interior Department. This rate is multiplied by the total direct cost base of the contractor's contracts for a particular fiscal year to determine the contractual amount for indirect costs.

ISDA was amended by Public Law 100-472 to address recurring problems in implementation, particularly the problem of inadequate provision for indirect costs. Congress found that "the single most serious problem with implementation of the Indian self-determination policy

has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for indirect costs associated with self-determination contracts," S. Rep. 274, 100th Cong., 2d Sess. at 8 (reprinted 1987 U.S.C.C.A.N. 2620, 2627). Accordingly the amendments added the mandatory contract support provision at 25 U.S.C. § 450j-1(a)(2) and 1(g).

Subsequent to the House-Senate conference on the 1988 Amendments, a clause was inserted at the end of a list of limitations on the Secretary's authority to reduce funding:

> Notwithstanding any other provision in this subchapter, the **provision of funds** under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

25 U.S.C. § 450j-1(b). (Emphasis added). This case turns on the interpretation of that provision.

A. Material Facts.

For fiscal year 1995, the Oglala Sioux Tribal Public Safety Department contracted under ISDA to operate the Pine Ridge Reservation Police Force and incurred indirect costs of $1,313,840. Congress appropriated "not to exceed $95,823,000 . . . for contract support costs" to the Bureau of Indian Affairs for contracts entered pursuant to ISDA (Public Law 103-322) (Appx. E). The sum was sufficient to provide funding for only 91.74% of contracted indirect

costs, and Oglala received $108,506 less than the negotiated contract amount. However, the Secretary did not notify Oglala of the shortfall until after ten months of its contract period had elapsed and after it had performed the bulk of the contracted law enforcement program. Similar shortfalls have chronically appeared in each of the last ten years. Prior to Fiscal Year 1994, however, there was no limitation on the amount of the appropriation available for contract support and shortfalls were routinely covered by reprogramming unobligated balances.[1]

B. Proceedings Below.

After the contracting officer denied its claim for full funding of the contract amount, Oglala appealed to the Interior Board of Contract Appeals (IBCA), which relied on settled authority to conclude that Interior was legally bound by the ISDA contract to provide full indirect cost funding. (Appx. C)

The government appealed to the Federal Circuit under 28 U.S.C. § 1295. The majority opinion by Plager, J.,

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[1] *See, generally,* "Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Needs To Be Addressed," U.S. General Accounting Office (June 1999) No. B-282458 [GAO Report]. Shortfalls since 1990 have averaged 16.8% and have risen to as much as 23% in 1993 and 1997. *Ibid.*, Figure 2.5 at 32 (Appx. F); Report: "A Study of Contract Support Costs in The Bureau of Indian Affairs and Recommendations for Reform," BIA Work Group on Contract Support Costs No. 5, June 1999, at Findings -14 (Appx. G). These shortfalls are in addition to the computational shortfalls declared illegal in *Ramah Navajo Chapter v. Lujan*,112 F.3d 1455 (10th Cir. 1997).

relying on his own dissenting opinion in the nearly contemporaneous case of *American Telephone & Telegraph Co. v. United States*, 177 F.3d 1368, 1379-81 (en banc) (Fed. Cir. 1999), held that the language to be construed constitutes a cap which is absolute and controlling despite the mandatory inclusion of full contract support per the negotiated rate in the Oglala contract. The decision vitiates the statutory scheme of 25 U.S.C. § 450 and is specifically contraindicated by legislative history manifesting Congressional recognition that full funding of tribal indirect costs associated with self-determination contracts is essential to the policy. The concurrence of Gajarsa, J. accurately notes that the result renders the ISDA a "travesty" and muses that the Oglala Sioux might try another procedure in some other venue – perhaps the Court of Claims. In short, the ruling below relies on a decision of the same court actually standing for the opposite proposition for which it is cited. *AT&T* rests on the principle that "the invalidation of a contract after it has been fully performed is not favored," 177 F.3d, at 1375, and holds that a government contractor who has innocently performed its contract may not be made to suffer termination of its contract as a penalty.

REASONS TO GRANT THE PETITION

A. THE DECISION BELOW OVERTURNS THE FUNDAMENTAL POLICY OF FEDERAL-INDIAN RELATIONS.

As the decision below notes, the subject matter of this dispute is in litigation across the country.[2] The reason is that without adequate funding of overhead costs, the policy of Indian self-determination ushered in with great fanfare by President Nixon's *Special Message to the Congress on Indian Affairs*, Pub. Papers 564 (Richard M. Nixon), 6 Pres. Doc. 894 (1970), and adopted into law in early 1975 as Public Law 93-638, becomes yet another hollow promise and unfulfilled commitment. However, in this case, Congress has taken direct and express action to forestall the very harm which the court below has brushed aside with nary a reference to fundamental rules of statutory construction.

In the 1988 amendments to ISDA, Congress sought once and for all to remedy the growing problem of inadequate contract support costs. After a lengthy legislative process commencing in the early 1980s (*see* generally, S. Rep. No. 274, 100th Cong., 2d Sess., *reprinted in* 1987 U.S.C.C.A.N. 2620), Congress made plain that full contract

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[2] *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), on remand *sub nom.*, *Ramah Navajo Chapter v. Babbitt*, 50 F.Supp.2d 1091 (D.N.M. 1999) (approving partial class settlement); *Shoshone-Bannock Tribes v. Shalala*, 988 F.Supp. 1306 (D. Or. 1997), *mod. oth. grnds*, 999 F.Supp. 1395 (D. Or. 1998); *Cherokee Nation v. United States*, No. 99-092-S CIV (E.D.Okla.) (pending summary judgment); *California Rural Indian Health Board, Inc. v. Shalala*, No. C-96-3526 DLJ (N.D.Cal.).

support costs and associated judicial remedies were to be afforded to tribal contractors. In a key passage presaging adoption of Public Law 100-472, the conference report states:

> The Federal Government would not consider it proper to shortchange funding for contracts with private suppliers of goods and services. When the Bureau of Indian [A]ffairs and the Indian Health Service contract with tribes, however, they routinely fail to reimburse tribes for legitimate administrative costs associated with carrying out federal responsibilities. **Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian self-determination is to succeed.**

Id., at 13, *reprinted* 1987 U.S.C.C.A.N. 2632. (Emphasis added).

Accordingly, in 1988 Congress inserted **mandatory** funding requirements directing the Secretary to add to each contract the full amount of contract support for the "reasonable costs" of carrying out the contract "to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-1(a)(2) and -1(g). It emphasized its purpose by granting jurisdiction to federal district courts to correct government breaches of ISDA contracts and to afford full remedies including injunctions and damages. 25 U.S.C. § 450m-1(a).

The very appropriation at issue, Public Law 103-332, embodies recognition that full payment of contact support is a legal obligation of the United States:

> The Committee is aware that significant shortfalls exist for fiscal year 1994 contract support funding. Unfortunately, budget constraints preclude the Committee from including sufficient funds to repay this shortfall. These shortfalls should be treated as one-time occurrences and should not have any impact on determining future indirect cost rates.

Sen. Rep. No. 103-294 at 57. (Emphasis added). *See also,* H. Rep. No. 103-740, at 32.

Yet, except for the concurring opinion of Judge Gajarsa, the Federal Circuit reviewed none of this history, holding that Congress unambiguously eviscerated the mandatory funding language and its own statement of purpose (25 U.S.C. § 450(b)) by limiting the United States' contractual liability based on after-the-fact appropriations vagaries. The panel exercised judicial fiat and not judicial reasoning to void a major federal policy which for twenty-five years has been the bedrock of Federal-Indian relations, a government-to-government engagement in which an honorable federal government sought to fulfill its treaty, moral, and legal obligations to Indian tribes by devolving control to them over their own federally-funded programs.

Had Congress really intended the conclusion reached, it could easily have used plain language clearly indicating that the full legal obligation as opposed to simply distribution turned on annual appropriations. *Cf., Government Systems Advisors, Inc. v. United States,* 847 F.2d 811, 812 (Fed. Cir. 1988) (holding that contract clause vitiated agency's contract obligation where clause expressly stated: "The Government's obligation under

this contract beyond that date is contingent upon the availability of appropriated funds from which payment for compensation can be made.") (Emphasis added); and *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 553 (Ct. Cl. 1980) (contract **obligation** made expressly contingent on future appropriations does not bind United States). Where, as here, however, both contractual language and statute require as well as authorize execution of a contract for a definite sum in advance of appropriations, only the timing of payment of that amount being made contingent on appropriations, the obligation remains. *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966); *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563 (1997).

B. THE INTERPRETATION RUNS COUNTER TO ESTABLISHED RULES OF CONSTRUCTION.

1. The Decision Misinterprets Plain Words

The opinion below holds that the words of § 450j-1(b) and Model Agreement ¶ (b)(4), 25 U.S.C. § 450*l*(c), are so clear and unambiguous only one interpretation is possible. It is unmoved by the inconsistency of its reading with the rest of the legislation and the overall intent of the legislation. It holds it need not consider the legislative history, which it dismisses as "selectively quoted."

But "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846 (1997). *And see, McCarthy*

v. Bronson, 500 U.S. 136, 139 (1991) (In asserting the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." quoting *KMart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). As Felix Frankfurter put it, dissenting in *United States v. Monia*, 317 U.S. 424, 431 (1943), "The notion that because the words of a statute are plain, its meaning is also plain, is . . . merely pernicious oversimplification."

Analysis of any statutory provision begins with the words themselves, and the words themselves do not support the Federal Circuit opinion. "Provision of funding" and "make available" are simply not the same thing as "contract amount." The contract amount remains $1,313,840. The "provision of funding" and "make available" are limitations on when the Secretary pays, but the when of paying does not give the United States unilateral authority to reduce a price term.[3]

It is apparent from the rest of the sentence in which it is embedded that the "provision of funding" language is directed to the Secretary's habit of robbing Peter to pay Paul, fulfilling obligations to one tribe by skimping obligations to another. The Federal Circuit opinion reaches its result in part by reading the words up to "appropriation" in a vacuum devoid of the rest of the sentence, indeed by not acknowledging there is a rest of the sentence, although the rest of the sentence is not even set off with a

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[3] In the Model Agreement at 25 U.S.C. § 450*l*(c)(¶b.4), the modifier "subject to the availability of appropriations" clearly modifies the "Secretary shall make available," not "total amount".

comma (*Cf., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 (1989).

Strengthening the contextual analysis, the "provision of funding" sentence comes at the end of a subsection of mandatory directives to the Secretary regarding the amount of funds. After enumerating the ways self-determination contract amounts **shall be determined** and **shall not be reduced** or reprogrammed, it makes no sense that a penultimate sentence fragment would give the United States unilateral authority to reduce contract amounts.

Self-determination contracts are, first and foremost, contracts. The purpose of the 1988 amendments is to strengthen self-determination contracts, to make them more enforceable and to assure year-to-year stability of funding. Where, as here, there is a plain meaning by which the phrase is harmonized with the legislation within which it appears, a court is obliged to adopt that reading. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Further, the court will disregard even the plainest of plain meanings where the result is absurd. *Murray v. Charleston*, 96 U.S. 432, 445 (1877). It is absurd to require a contractor to perform a vital government service on the contingent chance it might be paid for it. *AT&T v. U.S.*, 177 F.3d, at 1375.

The decision misconstrues the plain language of the proviso. The proviso unambiguously limits only the Secretary's duty to distribute funding, not the liability of the United States for the full amount of contract support costs mandated in 25 U.S.C. § 450j-1(a). The proviso is in harmony with the policy of the Anti-Deficiency Act, 31

U.S.C. § 1341, which permits execution of contracts in advance of appropriations where, as here, a statute so authorizes.

2. The Decision Vitiates The Legislative Scheme.

The statutory interpretation cases cited by the panel below notably concern provisions that are in harmony with the legislative schemes in which they occur.

Unlike the situation in *West Virginia University Hospital v. Casey*, 499 U.S. 83 (1991), where the plain meaning is consistent with legislative intent, here we do have "a contradictory disposition within the same enactment." Unlike the situation in *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986), here it cannot be said that a pro-Indian reading "conflicts with the central purpose" of the enactment. Unlike the situation in *United States v. Ron Pair Enterprises*, here we do see "a result demonstrably at odds with the intention of its drafters." In *Rubin v. United States*, 449 U.S. 424 (1981), the interpretation of a disposition for value of securities as comprehending a pledge of securities was "wholly consistent with the history and the purposes of the Securities Act of 1933"; but here, as the concurring opinion notes, the ISDA statute as a whole is vitatiated by the Federal Circuit's interpretation. App. 17.

The panel below reads the 1994 appropriations act as an implicit repeal of the ISDA and ignores the reaffirmation of the self-determination policy reflected in the Senate Committee's own words as part of the appropriation at issue here. *See*, Sen. Rep. No. 103-294, at 57; and H. Rep. No. 103-740, at 32. In any case, implied repeal is not

favored, especially in an appropriation act. *TVA v. Hill*, 437 U.S. 153, 190 (1978). *See also, New York Airways, Inc. v. United States*, 369 F.2d, at 749.

3. The Decision Subverts Indian Policy And Violates The Canon Of Construction Favoring Indians.

As Felix Frankfurter wrote in the symposium in memory of Felix Cohen, 9 Rutgers L. Rev. 355, 356 (1954), "the intricacies and peculiarities of Indian law demand an appreciation of history."

The ISDA was an explicit Congressional reorientation of federal Indian policy away from the disruptive effort to eliminate Native American cultures and assimilate Native Americans, towards the empowerment of Native American communities to control their own destinies. ISDA proclaims "an orderly transition from . . . Federal domination" to "effective and meaningful participation by the Indian people in planning, conduct, and administration" of governmental programs and services through its contracting mechanism. 25 U.S.C. § 450a(a).

Notwithstanding the contract mechanism, the BIA and some courts continued to regard ISDA obligations as being something less than contractual, particularly in the area of administrative overhead. The 1988 amendments were explicitly directed at this problem. *See, e.g.*, House Report 100-393:

> Today, many tribes feel they are being required to pay a penalty for the right to contract for the administration of Federal programs. Many costs associated with the performance of the contracts

> are not funded by the Federal government and therefore have to be covered by the tribes at their own expense . . . such as costs associated with audit, insurance, legal and accounting fees. . . .
>
> HR 1223 attempts to remedy such problems by amending the Self-Determination Act so as to **guarantee the tribes an adequate level of funding for contract support costs.** (Emphasis added).

The Federal Circuit's interpretation of the "provision of funding" clause is absolutely inconsistent with such a guarantee. But by dismissing the legislative history as "selectively quoted," the panel below avoids dealing with it.

The panel's approach to interpretation is diametrically at odds with the Indian canon of construction, which holds that doubtful or ambiguous provisions must be construed favorably to Indians. *Bryan v. Itasca County*, 426 U.S. 373 (1976). As with Indian treaties, not only doubtful expressions but also the entire scheme should be interpreted as the Indians would have understood it. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Worcester v. Georgia*, 6 Pet. 515, 582 (1832); *see also, South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 527 (Blackmun, J. dissenting). It also ignores its own precedents as to statutory construction, which require looking to legislative history as well as plain meaning to ascertain the intent of Congress. *Amgen, Inc. v. U.S. Int'l Trade Com'n*, 902 F.2d 1532, 1538 (Fed. Cir. 1990).

C. THE DECISION IS INCONSISTENT WITH THE REASONING OF OTHER CIRCUITS.

Both the Tenth Circuit and District of Columbia Circuit have recognized that ISDA contracts embody mandatory price provisions for contract support costs. In *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), the Tenth Circuit held that the Secretary's method of computing contract support costs violated his duty to calculate the true costs involved and to add them to the contract, a recognition that ISDA contractors have a legal entitlement to the contract amount set forth in 25 U.S.C. § 450j-1(a)(2):

> Defendants' interpretation of the Act is unreasonable. Not only does its [sic] interpretation not benefit tribes that have chosen to enter into self-determination contracts, it harms them by depriving them of funds necessary to carry out those contracts. Contrary to the entire purpose of the Act, defendants' interpretation of the indirect costs funding provision does nothing to "assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities," or to [enhance] the development and perception of Indian tribes as self-government entities. S. Rep. No. 274, 100th Cong., 1st Sess. 1-2.

112 F.3d, at 1462.

In *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 338, 1345 (D.C. Cir. 1996) the District of Columbia Circuit held that the Secretary had violated the Administrative

Procedure Act, 5 U.S.C. §§ 553 *et seq.*, 701(a)(2), by arbitrarily ignoring the policy of ISDA with regard to contract support in drastically reducing the amount of funding of contract support for tribes who had failed to apply for indirect cost rates within an arbitrary deadline. Both decisions recognized the distinction between an entitlement to a definite amount of contract support and the Secretary's duty, in keeping with the Anti-Deficiency Act, 31 U.S.C. § 1341, not to "provide" funds under the contract in excess of an appropriation for that purpose:

> The real purpose of the proviso is quite different when read in the context of the entire Act. Given the **mandatory** terms of the Tribes' [CSC] **entitlement** under the Act, Congress clearly included the provision not to excuse the Secretary's **obligation** to follow the mandates of the statute, but rather to make evident that the Secretary is not required to **distribute** money if Congress does not allocate that money to him under the Act.

87 F.3d, at 1345 (emphasis added); *and see, Wetsel-Oviatt*, 38 Fed. Cl., at 570.

By contrast, the panel below misreads the quoted language from the D.C. Circuit case by ignoring its distinction between setting the contract amount and providing that amount under a particular appropriation. Then it seeks to distinguish the Tenth Circuit decision on the basis that it only dealt with the method of calculating the entitlement to contract support costs without acknowledging the equally strong language recognizing the tribe's right to have the proper amount for contract support costs added to its contract.

D. THE DECISION RENDERS GOVERNMENT OBLIGATIONS SUSPECT.

As a general matter the rights and duties in a government contract are governed by the law applicable to contracts between private individuals. *Lynch v. United States*, 292 U.S. 571 (1934). "The Government-as-contractor cannot exercise the power of its twin, the Government-as-sovereign, for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered," *Yankee Atomic Electric Co. v. U.S.*, 112 F.3d 1569, 1575 (Fed. Cir. 1997).

New York Airways, Inc. v. United States is directly on point. The Civil Aeronautics Board was authorized to contract with airmail carriers. The Board and the Postmaster General were authorized, as here, to make contract payments out of appropriations. As here, the appropriation was not forthcoming.

> It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a government obligation. . . . The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable [in court].

369 F.2d, at 748.

A contract whereby one party retains the right to unilaterally reduce the price terms is illusory under

ordinary principles of contract law. *See, Murray v. Charleston* ("A [government's] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." 96 U.S., at 445); and *Freytag v. Com'n of Internal Revenue*, 501 U.S. 868, 877 (1991) (Supreme Court is deeply reluctant to interpret statutory provision so as to render superfluous other provisions in same enactment). Congress cannot be presumed to have authorized illusory self-determination contracts.

Indeed, "it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights." *U.S. v. Winstar Corp.*, 518 U.S. 839, 876 (1996). As in *Winstar*, the nullification of contractual certainty conflicts with United States' interest "as a reliable, straightforward contractor" (518 U.S., at 886) and this Court's recognition that "it is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with the government." 518 U.S., at 886, fn 31. In short, "an invalidation of a contract after it has been fully performed is not favored." *AT&T*, 177 F.3d, at 1375.

CONCLUSION

The Federal Circuit has seriously undermined the fundamental policy Congress has established for its relations with Native Americans, and it has used a flawed statutory analysis and misstated authority to do so. The writ should be issued accordingly.

Respectfully submitted,

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ON BRIEF
ERIC TREISMAN
STEVEN L. TUCKER
Santa Fe, New Mexico

January 2000

APPENDIX A

Bruce BABBITT, Secretary of the Interior, Appellant,

v.

OGLALA SIOUX TRIBAL PUBLIC SAFETY DEPARTMENT, Appellee.

No. 99-1033.

United States Court of Appeals, Federal Circuit.

Oct. 27, 1999.

Leslie V. Batchelor, Attorney, Civil Division, Commercial Litigation Branch, Department of Justice, of Washington, DC, argued for appellant. With her on the brief were David W. Ogden, Acting Assistant Attorney General; David M. Cohen, Director; and Kirk T. Manhardt, Assistant Director.

Michael P. Gross, Law Offices of Michael P. Gross, of Santa Fe, New Mexico, argued for appellee. Of counsel was Carl Bryant Rogers, Roth, VanAmberg, Rogers, Ortiz, Fairbanks & Yepa, LLP, of Santa Fe, New Mexico.

Before MICHEL, PLAGER, and GAJARSA, Circuit Judges.

Opinion for the court filed by Circuit Judge PLAGER. Additional views filed by Circuit Judge GAJARSA.

PLAGER, Circuit Judge.

The United States Department of the Interior Board of Contract Appeals ("IBCA" or "Board") granted summary judgment against Bruce Babbitt, Secretary of the

Interior ("Government" or "Interior"), and in favor of Oglala Sioux Tribal Public Safety Department ("Oglala"). *See Appeal of Oglala Sioux Tribal Pub. Safety Dep't*, IBCA No. 3680-97, 98-2 BCA 29,833, 1998 WL 347090 (Interior B.C.A. June 24, 1998). In its appeal to the Board, Oglala claimed entitlement to all of its indirect (contract support) costs on its 1995 fiscal year self-determination contracts under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. §§ 450-450n (1994); Interior had provided only about 92% of the contract amount for such costs due to a shortage in congressional appropriations. The IBCA concluded that Oglala was entitled to full funding. The Board reasoned that Interior was legally bound to provide Oglala with full indirect costs notwithstanding Congress's reduced lump sum appropriation for ISDA contracts and an express congressional cap on funds for indirect costs. Because the ISDA explicitly makes funding of ISDA contract indirect costs subject to the availability of appropriations, and because Interior had no choice but to comply with the statute, we reverse the decision of the Board and remand the case.

BACKGROUND

This appeal is one of a number of disputes stemming from the ISDA. The ISDA's stated purpose is to allow Native American tribes to operate their own federal programs directly. Under the ISDA, a tribe and the Secretary of the Interior enter into a "self-determination contract," which incorporates the provisions of the model contract contained in the ISDA text. *See* 25 U.S.C. § 450*l*(a), (c) (1994). The ISDA requires the Department of the Interior's Bureau of Indian Affairs ("BIA") to fund programs

(base funding) and to fund indirect costs to self-determination contractors. The indirect cost rate is determined by annual negotiations with the Department of the Interior's Office of the Inspector General. The resulting rate is multiplied by the total direct cost base of a contractor's contracts for a particular fiscal year to calculate the indirect cost amount. Funding of ISDA contracts is dependent upon congressional appropriations.

Appellee, Oglala Sioux Tribal Public Safety Department, is a tribal organization which operates an ISDA contract for public safety on the Pine Ridge Reservation in South Dakota for the Oglala Sioux Tribe. Oglala has a multi-year ISDA contract with the BIA. For fiscal year 1995, Oglala incurred indirect costs of $1,313,840. Some of these indirect costs were expended prior to congressional appropriations for the fiscal year.

For fiscal year 1995, Congress appropriated $1.5 billion for the operation of Native American programs, "of which not to exceed $95,823,000 shall be for payments . . . for contract support costs" for contracts authorized by the ISDA. *See* Interior Appropriations Act of 1995, Pub.L. No. 103-332, 108 Stat. 2499, 2511 (1994). Due to the cap in funding of contract support costs, the Secretary implemented a plan to allocate the available funds. *See* Distribution of Fiscal Year 1995 Contract Support Funds, 59 Fed.Reg. 55318 (1994). In the end, tribes that submitted timely proposals all received 91.74% of their indirect costs. Oglala received 91.74%, which was $108,506 less than the originally negotiated amount. After the contracting officer denied Oglala's claim for full funding of indirect costs, Oglala appealed to the IBCA.

The IBCA granted summary judgment to Oglala after the Government failed to show cause why this case differed from *Appeals of Alamo Navajo Sch. Bd., Inc., Miccosukee Corp.*, IBCA No. 3463, 98-2 BCA 29,832, 1997 WL 759441 (Interior B.C.A. Dec. 4, 1997), which involved the same legal issue.[1] In *Miccosukee*, the IBCA concluded that Interior was legally bound by the ISDA contracts to provide full indirect cost funding, despite specific congressional limitations on appropriations for indirect costs. *See Miccosukee*, No. 3464, slip op. at 45. The IBCA reached this conclusion on the basis of its reading of the ISDA and case law, independent of the Government's trust responsibilities to Native Americans. *See id.* at 51-52. Although Oglala's indirect costs suit involves a different fiscal year than that in *Miccosukee*, the IBCA reasoned that minor factual differences between the two cases failed to raise a genuine issue of material fact that would preclude summary judgment against the Government based on *Miccosukee*. *See* Appeal of Oglala Sioux Tribal Pub. Safety Dep't, No. 3680-97, slip op. at 2.

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[1] The appeals in both cases were heard together, and are decided together today. Before the IBCA, *Miccosukee* appealed the contracting officer's denial of full funding of its contract support costs, as well as the denial of full funding of its administrative cost grant ("ACG") for school operations programs. The Board consolidated *Miccosukee*'s appeals with those of Alamo Navajo School Board, Inc., who claimed entitlement to full funding of its ACGs for its school programs. In *Miccosukee*, the Government is only contesting the Board's ruling as to contract support costs; thus, *Miccosukee* is the only appellee in that case.

The Government appeals the IBCA's grant of summary judgment for Oglala. We have jurisdiction to hear this appeal under 28 U.S.C. § 1295 (1994).

DISCUSSION

The grant of summary judgment is reviewed as a matter of law, to determine that no genuine issues of material fact exist when the record is read in the light most favorable to the non-moving party, and that the moving party is otherwise entitled to judgment on the law. *See Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1107 (Fed.Cir.1992). Conclusions of law are reviewed independently and without deference, *see Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258, 262 (Fed.Cir.1995); though, of course, we give careful consideration to the Board's legal conclusions in recognition of its "considerable expertise in construing government contracts," *West v. All State Boiler, Inc.*, 146 F.3d 1368, 1371 (Fed.Cir.1998).

On appeal the Government argues that Oglala has no statutory or contractual right to additional funding for its contract support costs because under the ISDA the requirement to fund such costs is subject to the availability of appropriations. As in any case of statutory interpretation, we begin with the language of the statute, specifically, 25 U.S.C. § 450j-1 (1994), entitled "Contract funding and indirect costs." Subsection (a) describes the amount of funds to be provided. For example, Interior is obligated to provide direct costs "not less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . for the period covered by

the contract." 25 U.S.C. § 450j-1(a)(1) (1994). In addition, Interior must supply "contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management. . . . " *Id.* § 450j-1(a)(2). The following subsection, 450j-1(b), describes reductions and increases in the amount of funds provided. This subsection concludes with the unequivocal statement that: "*Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations.* . . . " *Id.* § 450j-1(b) (emphasis added).

The language of § 450j-1(b) is clear and unambiguous; any funds provided under an ISDA contract are "subject to the availability of appropriations." The clause preceding this limitation, "[n]otwithstanding any other provision in this subchapter," further clarifies that other statutory language in the ISDA relied upon by Oglala, *see, e.g.*, § 450j-1(f) ("Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection(a)."), cannot trump this express restriction on ISDA funding.

Other sections of the ISDA indicate congressional intent to make ISDA funding subject to the availability of appropriations. For example, § 450j(c) sets the term of self-determination contracts and states "[t]he amounts of such contracts shall be subject to the availability of appropriations." Likewise, the model contract set out in the ISDA, which is contained in or incorporated by reference into each self-determination contract under the

ISDA, specifies that "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement. . . . " *Id.* § 450*l*(c).

Oglala asks this court to use the general intent underlying the ISDA to trump the express language of the statute. There are two problems with following such an approach.

First, in the face of congressional under-funding, an agency can only spend as much money as has been appropriated for a particular program. *See Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170-71 (Fed.Cir.1995) (citing 31 U.S.C. § 1341(a)(1)(A) (1994)). Thus, Interior properly allocated the $95,823,000 earmarked for contract support costs by giving eligible self-determination contractors 91.74% of their indirect costs. *See Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1348-49 (D.C.Cir.1996) (explaining how a pro rata reduction scheme would effectuate the original statutory scheme of the ISDA and comply with congressional intent behind the 1995 Appropriations Act).

Second, if we accepted Oglala's selectively quoted legislative history as a clear congressional statement of intent that ISDA indirect costs must be fully funded, it would render the subject-to-appropriations language of § 450j-1(b) meaningless. It would exceed our judicial function to repeal the unambiguous language of § 450j-1(b) in such a fashion. *See West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) ("The best evidence of [congressional] purpose is the statutory text adopted by both Houses of

Congress and submitted to the President. Where that contains a phrase that is unambiguous . . . we do not permit it to be expanded or contracted by the statement of individual legislators or committees during the course of the enactment process."); *cf. Iselin v. United States*, 270 U.S. 245, 250-51, 46 S.Ct. 248, 70 L.Ed. 566 (1926) (reasoning that to supply an omission in a statute whose language was plain and unambiguous would transcend the judicial function). Instead, we must assume that Congress "says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, . . . 'judicial inquiry is complete.' " *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (internal citations omitted) (*quoting Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (applying the rule that if the statute's language is plain, then the "sole function of the courts is to enforce it according to its terms" (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917))); *American Tel. & Tel. Co. v. United States*, 177 F.3d 1368, 1379-81 (Fed.Cir.1999) (en banc) (Plager, J., dissenting-in-part). Furthermore, we decline to find that Interior's pro rata allocation of the capped appropriations providing Oglala 91.74% of its indirect costs for 1995 constitutes an absurd result. *See United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 277, 49 S.Ct. 133, 73 L.Ed. 322 (1929) (enforcing the plain meaning of the provision since it leads to nothing impossible or plainly unreasonable).

The Supreme Court has cautioned, with respect to the interpretation of treaty language, that "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-06, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986). Thus, even if we were to construe the agreement between Interior and the Oglala Tribe as analogous to a treaty, in the absence of ambiguity the agreement "must be interpreted according to [its] natural and ordinary significance," and only if the words are ambiguous, "then resort may be had to such evidence, written or oral, as will disclose [the parties' intent]." *United States v. Choctaw Nation*, 179 U.S. 494, 531, 21 S.Ct. 149, 45 L.Ed. 291 (1900). No such ambiguity exists here.

Oglala relies upon *New York Airways, Inc. v. United States*, 177 Ct.Cl. 800, 369 F.2d 743 (1966), to support its contention that it is entitled to full funding of contract support costs regardless of any congressional appropriation caps. *New York Airways* sued the Government for money allegedly due for transporting mail by helicopter. *See id.* at 744. As a certified carrier of mail, *New York Airways* was statutorily entitled to receive reasonable compensation in the form of fixed monthly payments, but funds earmarked for the mail service had been exhausted for the fiscal year, leaving *New York Airways* with an unpaid balance. *See id.* The *New York Airways* court concluded that the "mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation

created by statute." *Id.* at 748 (citing *United States v. Vulte*, 233 U.S. 509, 49 Ct.Cl. 687, 34 S.Ct. 664, 58 L.Ed. 1071 (1914)). *New York Airways* involved a situation in which the Government, as a contracting party, had simply failed to appropriate and pay its unqualified contractual obligation. Oglala's situation differs fundamentally in that the ability of Interior to bind the Government contractually was expressly conditioned on the availability of appropriations.

The D.C. Circuit reached the same conclusion in *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1341-42, 1345 (D.C.Cir.1996) ("*Ramah I*"). The *Ramah I* court discussed § 450j-1(b) of the ISDA as part of its analysis of how much discretion the Secretary had to allocate indirect funds with respect to the 1995 congressional cap on the appropriation amount available for ISDA contract support costs. The court noted that the Secretary is "not required to distribute money if Congress does not allocate that money to him under the Act. The first part of the provision [§ 450j-1(b)] says just that. . . . " *Id.* at 1345. The court then concluded that despite a tribe's claim that it is entitled to the funds under the ISDA, if the money is not available, it need not be provided. *See id.* Thus, the D.C. Circuit found the language of § 450j-1(b) as clear as we do. *See id.* ("Thus, we read the subject-to-availability-of-funds provision to mean precisely what it says: the Secretary need only distribute the amount of money appropriated by Congress under the Act. . . . ").[2]

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[2] The ultimate outcome in *Ramah I* turned on the validity of the Secretary's 1995 allocation plan for the limited amount of indirect cost money available.

Oglala responds with a Tenth Circuit case in which the court concluded that self-determination contractors are entitled to full funding for all reasonable and necessary contract support costs. *See Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1463 (10th Cir.1997) ("*Ramah II*"). But the shortfall in *Ramah II* was caused by Interior's Office of the Inspector General's inclusion of state program funds in the plaintiff's direct costs base for five self-determination contracts, which resulted in a lower (44.5%) indirect costs rate than the 48.1% rate that plaintiff had calculated (by excluding the state program funds). *See id.* at 1459. The *Ramah II* court reasoned that the inclusion of these state program funds in the direct cost base was improper because the state program funds did not include funding for indirect costs. *See id.* at 1463. Thus, the *Ramah II* court's holding only specifically prohibits adverse adjustments to the calculation of ISDA indirect costs stemming from non-funding of indirect costs by other state or federal agencies and does not address the problem in this case – congressional under-appropriation of funds.

Oglala further argues that it relied to its detriment (by spending indirect cost money before it was appropriated) on the expectation that it would receive full indirect costs funding based on the entitlement language of ISDA § 450j-1(g). Such an estoppel claim requires that Oglala prove that its reliance was reasonable. *See Heckler v. Community Health Servs.*, 467 U.S. 51, 59, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984) (citing Restatement (Second) of Torts § 894(1) (1979)). Although Oglala may have expected to

receive full funding of such costs based on past experience, the subject-to-availability-of-appropriations language present in § 450j-1(b) as well as in the model contract, § 450*l*(c), precludes a finding that Oglala's reliance was reasonable. The unequivocal statutory language prevents Oglala from asserting that it was entitled to full funding as a matter of right. *See id.* at 62, 104 S.Ct. 2218. In addition, even assuming that Oglala's reliance were reasonable, no estoppel may lie against the Government when the claim for payment out of public funds is contrary to a statutory appropriation. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 423-24, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990).

Finally, to the extent that Oglala raises other arguments[3] on various theories of entitlement to the 8.26% of indirect costs that it failed to receive in 1995, we find them unpersuasive.

CONCLUSION

For the above reasons, we reverse the IBCA's award of summary judgment that Oglala is entitled to the full amount of its indirect costs for its 1995 fiscal year ISDA contracts and remand the case for further proceedings consistent with this opinion.

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[3] During oral argument, the Government clarified that whether the Government's fiduciary duty to the tribe had been breached by Interior's less-than-full funding of Oglala's indirect costs for fiscal year 1995 was outside the scope of this appeal. Therefore, we need not address this issue.

COSTS

Parties shall bear their own costs.

REVERSED & REMANDED.

GAJARSA, Circuit Judge, additional views.

I write separately not in dissent from the final decision, because I cannot find fault with my colleagues' reasoning; rather, I write to express my concern at the manner in which Native American programs once established are funded.

From the original formation of the United States, the relationship between the Native American tribes and the central government has been one of dependency, and, in many instances, the tribes were considered wards of the state. As their relationship developed over the course of time, it was recognized as a legal trust, but it still remained a dependent system which failed to create an environment within which the tribes could pursue objectives that they themselves determined to be of paramount importance. This failure allowed the federal government to maintain the symbiotic relationship with the tribes. It was with this historic perspective that some tribal leaders sought to obtain the right to determine their own destiny and to become truly self-governing. This perspective was the impetus for a self-determination policy.

The original self-determination policy allowing Native American tribes to assume the responsibility of managing the federal programs designed for their benefit by the Bureau of Indian Affairs ("BIA"), was proposed by the Commissioner of Indian Affairs, the Hon. Louis R.

Bruce, in 1970. His proposal required the entire bureaucracy to undertake a paradigm shift in the method by which the federal service programs were delivered to the Native American tribes. This shift was crucial to the realization of the self-government of the tribes. The management of the various programs by the beneficiaries was a basic but pragmatic change in the then existing relationship between the United States and Native American tribes. The complacency and patronizing manner with which the federal bureaucracy had rendered services to the Native Americans was troubling not only to Commissioner Bruce, who was only the second Native American to be appointed to that position, but also to then President Nixon. The President had taken a special interest in Native American issues and raised them to a major priority during his administration.

The underlying, primary objective of the self-determination policy was to provide Native American tribes with the opportunities to develop leadership skills crucial to the effectiveness of self-government. To affect this objective, the federal government granted the Native American tribal governments decision making authority for the federal programs serving their reservations.[1] This objective was to be accomplished within the parameters of the legal trust relationship existing between the tribes and the federal government. It is this trust relationship that establishes the legal obligation between the Native

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[1] Ironically, the first tribe to negotiate an agreement to take over the BIA services in 1970, which served as a precursor for the later enactment of the Indian Self-Determination Act, was the *Miccosukee* tribe, one of the parties to these appeals.

American communities and the federal government. This legal obligation, pursuant to numerous treaties and judicial opinions, has been recognized from the incipient stages of the federal government to the present day. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980); *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-18, 58 S.Ct. 794, 82 L.Ed. 1213 (1938); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831). This trust relationship, however, does not exist exclusively and solely between the tribes and the Executive branch. It also extends to the Legislative branch.

The statutory structure for the self-determination policy did not come into being until Pub.L. No. 93-638 was enacted by the Congress in 1975. The statute was known as the Indian Self-Determination and Education Assistance Act, Pub.L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 USC § 450, et. seq.) ("ISDA"). Initially, the structure did not allow for specific administrative support costs, the indirect or support costs were taken directly from the program funding. It was finally understood that taking these costs from the program funding shortchanged the programs and limited the extent of the coverage available from the programs. The Congress subsequently authorized the Secretary of the Interior ("Secretary") to negotiate annually the "Indirect Cost Agreement" with the tribal representative.

Under the program, the Office of Inspector General ("OIG"), by delegation from the Secretary, negotiates with the tribes the Indirect Cost Agreement, which sets forth the indirect cost rate incorporated into the ISDA

contracts. The Department of Interior then uses the indirect cost rate to determine the amount of contract support cost funding payable to the tribal contractor under the statute. The Indirect Cost Agreement negotiations usually take place prior to the start of the fiscal year or prior to the Congress' budget appropriation. The OIG and the tribes negotiate in good faith that program funds will be appropriated and that indirect costs will be adequately funded. Indeed, the Congress has recognized that "[f]ull funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed." S.Rep. No. 100-274, at 13 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, at 2632.

The Congress established the Indirect Cost Agreements because it was cognizant that the success of the self-determination program hinged upon the infusion of indirect costs to support the administrative overhead burden that was to be carried out by the tribal contractor. Knowing that it had shifted the burden of providing the program services to the tribal members from the BIA to the tribal governments, the Congress appropriated the necessary funds required to manage such programs. For many years the Congress, by its continued support, recognized and carried forth its trust obligation under the ISDA. Through these programs, the tribes have improved the quality of life for their members. The self-determination policy has been woven into the fabric of the overarching trust relationship, in which the Congress and the Secretary jointly execute the responsibilities of their trust. The 1994 Appropriations Act, however, raises the unpleasant specter that the Congress, now wishing to

limit the obligation that is clearly stated in the preamble of the statute, 25 U.S.C. § 450, intended to avoid, and in effect eliminate, its trust obligation by the "notwithstanding" clause, 25 U.S.C. § 450j-1(b), thereby vitiating the entire program.

The critical thread of this country's social fabric is the belief that laws exist to protect our institutions and to enforce obligations undertaken by various agreements. *See e.g., Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819). Our democratic government is based upon the premise that we are a country of laws that are fair, just, and equally applied for the protection of all its citizens. The saliency of any Congressional action derives from the government's duty to fulfill its legal obligations. Americans take great pride in the fact that when our government makes a promise, it keeps that promise or suffers the consequences of its breach. *See United States v. Winstar*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996). Sadly, in the present case, we are confronted with promises made and promises broken.

Although we as a court do not legislate but only interpret the laws that are enacted by the legislature, we cannot, and should not, stand by idle without calling attention to the travesty that has been perpetrated in these cases. As we have stated in our opinion, when the statutory language is unambiguous, the judicial inquiry is complete and the sole function of the court is to enforce the statute according to its terms. However, what course should a court take when, as here, the statutory language is clear but the legislative intent is equally clear yet would impose a different outcome? While a court must consider the statutory language to ascertain if it "has a

plain and unambiguous meaning with regard to the particular dispute in the case," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 846, 136 L.Ed.2d 808 (1997), might it also seek to determine whether that language is in conflict with the clear statutory scheme that the Congress designed to satisfy its trust responsibilities? Should not the Congress resolve this conflict?

Here, the government does not expressly argue that the 1994 Appropriations Act repealed the provisions of the ISDA authorizing the indirect support contracts that the tribal organization and the OIG negotiated. The effect of the 1994 Appropriations Act, however, is to leave the Native American tribes without recourse to recover the expenses that they had already incurred by performing BIA functions in reliance on the OIG negotiations. If the Congress continues the appropriation reductions, similar to the 1994 Appropriations Act, giving effect to the "notwithstanding" language would not only amend but effectively repeal the authorizing statute.

The federal government cannot obviate its legal trust obligations by subsequent statutory amendments when others have acted in reliance on the government's initial position. The federal government should be bound by an agreement independent of the form of, or the parties to, that agreement. In *Winstar v. United States*, 64 F.3d 1531 (Fed.Cir.1995), this Court stated that the terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation, absent a specific contractual provisions providing for such a change. This position was affirmed in *United States v. Winstar*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), in which the Supreme Court reasoned that the

notion that the federal government could avoid a contractual obligation through subsequent legislation would conflict with the government's "own long-run interest as a reliable contracting partner in the myriad of workaday transactions of its agencies." *Id.* at 883, 116 S.Ct. 2432.

Moreover, in the specific context of the Native American and federal government relations, the Supreme Court has explicitly recognized that

> In carrying out its treaty obligations with Indian Tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which is found expressly in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. United States, 316 U.S. 286, 296-97, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942) (footnotes omitted). This principle applies with equal force to legislative actions. Having exacted this fiduciary responsibility, the *Seminole Nation* decision supports the proposition that any Congressional limitation on trust obligations owing to Native American tribes must be clearly expressed and specifically supported by the surrounding circumstances and legislative history. In the present case, we not only have the Congress' clear intent established as a matter of policy, but we also have the requirement that tribes enter into agreements on the good faith that the Congress will fulfill its legal obligation.

If the federal government is to carry out its trust responsibility, it is incumbent upon the Secretary to seek and request the necessary funds in the appropriation process and for the Congress to appropriate those funds. Failure to do so by the Secretary and the Congress, in and of itself, may be considered a breach of the federal government's fiduciary obligation to carry out its trust responsibility.

The federal government, in this instance, relies on *Republic Airlines, Inc. v. United States Dept. of Transp.*, 849 F.2d 1315, 1320 (10th Cir.1988), for the proposition that the Congress can in fact amend a substantive underlying statute through an appropriations act. The government's reliance on that particular decision, however, is misplaced because that case is distinguishable from *New York Airways, Inc. v. United States*, 177 Ct.Cl. 800, 369 F.2d 743 (1966). In *Republic Airlines*, there was clear congressional intent to eliminate the substantive programs, *see* 849 F.2d at 1318-22, while in *New York Airways* the court specifically provided that in order for an appropriations act to modify an underlying statute, the appropriations act must clearly manifest the congressional intent to do so, *see* 369 F.2d at 749-51. In the present case, the 1994 Appropriations Act did not mention the authorizing statute (the ISDA), and the relevant legislative history left no doubt that the Congress knew it was not affirmatively altering the obligations under the authorizing statute and did not intend to do so. The Congress, by inserting limiting language in the same subsection that contains a clear mandate to fund the indirect cost agreements, cannot by such dialectic antagonism effectively curtail the substantive program by failing to enact the necessary appropriations

that are required to carry out the programs. The government clearly and fundamentally is in error when it ignores the statutory mandates of the substantive enacted legislation creating the program upon which the annual appropriation is based and which governs the use of funds in the absence of later amendatory statutory language.

Notwithstanding our statutory interpretation, other Native American tribes might consider seeking alternative remedies, perhaps premised on the *Winstar* doctrine, for their incurred indirect costs, if in fact not funded, through an action before the Court of Federal Claims.

APPENDIX B

(LOGO) IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF CONTRACT APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

APPEALS OF ALAMO NAVAJO SCHOOL BOARD, INC.
and MICCOSUKEE CORP.

IBCA 3463-3466
IBCA 3560-3562

Decided: December 4, 1997

Grant Nos. 34X02701, 34X02703, & GTS50T02623 and Contract Nos. CTS50T02602-2609, 2611-2612, 2615, & 2621 Bureau of Indian Affairs	Appellants' Motions for Partial Summary Judgment Granted; Government's Motions for Summary Judgment Denied

* * *

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

I. STATUS OF APPEALS

The Alamo Navajo School Board, Inc. (Alamo), and the Miccosukee Corporation (Miccosukee), two Federally recognized Indian Tribal organizations, have appealed the various decisions by the Department's Bureau of Indian Affairs (BIA) not to provide full funding of the Appellants' indirect costs – specifically, contract support costs (CSC's) under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. § 450j-1

(1994), and administrative cost grants (ACG's) in connection with the Tribally Controlled Schools Act of 1988 (TCSA), 25 U.S.C. § 2008 (1994). Alamo's appeals involve ACG's for 4 consecutive school years commencing in 1990, and Miccosukee's appeals involve both CSC's and an ACG for fiscal year 1994, all of which were reduced in amount because of shortfalls in BIA's total lump-sum congressional appropriation for the operation of Indian programs (OIP) in fiscal years 1990-94.

The disputes have arisen because the statutory language with respect to the calculation and payment of indirect costs is mandatory rather than discretionary. *See, e.g.*, 25 U.S.C. §§ 450j-1(a)(2), 450j-1(d)(2), 450j-1(g), 450*l*c)(b)(4), 2008(a)(1), and 2008(d)(4) (1994). Yet these authorizing Acts also provide that indirect cost funding is subject to the availability of appropriations. *See, e.g.*, 25 U.S.C. §§ 450j-1(b), 450*l*(c)(b)(4), and 2008(a)(1) (1994). The Acts further make clear that no funding is to be increased for one tribe at the expense of other tribes, 25 U.S.C. §§ 450j-1(b) and 2008(g)(2) (1994), and that amounts allocated for indirect costs are in addition to, and are not a basis for reducing, program or direct costs. *See* 25 U.S.C. §§ 450j-1 *passim* and 2008(a)(2) (1994).

The matter is before the Board on cross-motions for summary judgment on the legal issue of whether full funding of indirect costs, previously ascertained and agreed upon in a contract or grant agreement, is required by the two authorizing Acts when there is either a shortfall in total OIP appropriations or a specific funding limitation exists with respect to CSC or ACG payments. If full funding is required, then the parties agree that the

case should be remanded for a determination of quantum. We concur in that approach and therefore do not discuss a further issue raised by the Government in its pleadings; i.e., whether any ACG must be subtracted from the base amount before determining the amount of a CSC payment to which a multi-program contractor is entitled.

We have jurisdiction over the dispute pursuant to 25 U.S.C. §§ 450b(j), 450m-1(d), and 2508(e) (1994). *Rock Point Community School Board*, IBCA Nos. 3008, 3010, 93-2 BCA ¶ 25,777. Briefings by the parties in support of their motions were extensive, and oral argument was presented at the Board's Arlington, Virginia, hearing room on May 13, 1997, followed by final briefs. On the basis of the entire record, we have concluded that the position urged by the Appellants is the one most consistent with established contract and appropriations law and that the Tribes are entitled to full payment of their indirect costs, absent clear and specific provisions to the contrary in applicable appropriation Acts.

II. FACTS (from documents and briefs provided by the parties)

A. Alamo (ACG appeals only, school years 1990-94):

1. In Title V of Pub. L. No. 100-297, April 28, 1988, 102 Stat. 369, 25 U.S.C. § 2008, Congress established ACG's, by which the money for administrative and indirect costs would be provided to BIA-funded schools operated by tribes or tribal organizations.

2. The ACG *amount* is calculated annually by the BIA's Office of Indian Education Programs and is determined by multiplying the school's administrative cost percentage rate by the total amount of the direct program base funding for the fiscal year. The ACG percentage *rate* is determined by applying the formula set out in section 2008(c).

3. Alamo's ACG percentage rates were 20.72 percent for school year 1990-91; 20.26 percent for school year 1991-92; 19.19 percent for school year 1992-93, and 19.38 percent for school year 1993-94. But the BIA provided only 91.66 percent of Alamo's resulting ACG entitlement in school year 1990-91; 86.30 percent in school year 1991-92; 61.13 percent in school year 1992-93; and 77.51 percent in school year 1993-94, despite the BIA's announced figures of 91.93 percent (1990-91), 89.44 percent (1991-92), 65.08 percent (1992-93), and 83.58 percent (1993-94), per Stipulation by the parties dated September 30, 1996.

4. In none of the 4 school years in question did the BIA pay uniform percentages of their ACG entitlements to every tribe. The percentages of ACG entitlements actually paid to eligible recipients in those years varied widely, from 73 percent to 129 percent (1990-91), 62.47 percent to 105.20 percent (1991-92), 21.73 percent to 72.73 percent (1992-93), and 65.17 percent to 100.90 percent (1993-94), per Stipulation by the Alamo parties dated September 30, 1996.

5. As of August 5, 1996, there existed an expired unobligated balance of OIP funds in the amount of

$3,384,220 appropriated for fiscal year 1991 and an additional $1,001,341 in fiscal year 1991 funds available for obligation in fiscal year 1991-92, per Stipulation by the Alamo parties dated September 30, 1996.

6. As of August 5, 1996, there existed an expired unobligated balance of OIP funds in the amount of $3,442,301 appropriated for fiscal year 1992, and an additional $3,709,137 in fiscal year 1992 funds available for obligation in fiscal year 1992-93, per Stipulation by the Alamo parties dated September 30, 1996.

7. As of August 5, 1996, there existed an expired unobligated balance of OIP funds in the amount of $7,889,102 appropriated for fiscal year 1993 and an additional $2,484,106 in fiscal year 1993 funds available for obligation in fiscal year 1993-94, per Stipulation by the Alamo parties dated September 30, 1996.

8. On July 28, 1994, Alamo requested a grant officer's decision regarding the BIA's failure to provide full funding for these 4 years. The grant officer denied the claims on the ground that all ACG funds had already been expended.

9. Appropriations for the OIP for fiscal years 1990-94 were well in excess of $1 billion per year, of which well in excess of $200 million each year was specifically made available for school operations and other education costs. No specific funding amounts or limitations (earmarks) were specified for ACG's.

10. Alamo appealed to this Board for two reasons: First, because not all applicable direct costs had been included in the cost base when the ACG percentages were

applied during each of the 4 years in question; and, second, because a lower ACG percentage than that derived from the authorizing statute was used.

B. Miccosukee (12 CSC claims for fiscal year 1994; 1 ACG claim fiscal year 1994)

11. Miccosukee is a tribal organization authorized by the Miccosukee Tribe to carry out several noneducation self-determination contracts. It also has a contract to operate an elementary/secondary school.

12. The BIA is required by statute to provide CSC payments to self-determination contractors under the ISDA, as well ACG's for school operations. The CSC indirect cost rate is determined by annual negotiations with the Department's Office of the Inspector General (OIG). The resulting rate, which is formalized in a written agreement, is then multiplied by the total direct cost base of Miccosukee's contracts for fiscal year 1994 to determine the CSC amount.

13. Congress enacted a lump-sum appropriation in excess of $1.49 billion for the OIP for fiscal year 1994, some of which was earmarked for certain objectives. An indirect cost limitation of $91,223,000 was imposed on ISDA payments made under that Act. However, no limitation on ACG's was specified, Pub. L. No. 103-138, Nov. 11, 1993.

14. On December 28, 1993, the BIA issued a Notice in the Federal Register, 58 Fed. Reg. 68694 (1993), which stated that in the event of a shortfall in fiscal year 1994 CSC funds, it would distribute an equal proportion of their indirect cost percentages to each contractor. It was

not until June 1994, however, that the BIA notified ISDA contractors that it would distribute only 81.21 percent of the contractors' CSC needs as set forth in the contracts that had been negotiated with the OIG.

15. Miccosukee had negotiated a 41.51-percent indirect cost rate with the OIG for fiscal year 1994, but the BIA ultimately distributed only 81.21 percent of the CSC amount due to Miccosukee for its contracts in fiscal year 1994. Miccosukee claims entitlement to the full 41.51 percent that had been negotiated.

16. Miccosukee was entitled to an 18.79-percent ACG for its education contract under the statutory formula, but received only 83.58 percent of that amount in fiscal year 1994. It claims entitlement to the full 18.79 percent.

17. The contracting officer's (CO's) August 17, 1995, final Decision denied Miccosukee's claims on the ground that it had not presented evidence that it had *incurred* indirect costs and administrative costs in the amounts claimed. However, the Government has not sought to defend the CO's Decision on that ground.

III. POSITIONS OF THE PARTIES

A. Arguments by the Government

The Government's principal argument against the full funding of CSC's and ACG's when there is a reduction in appropriations is that the authorizing statutes state explicitly that they are subject to the availability of appropriations. Thus, when the amount of funds necessary to fully fund indirect costs exceeds the amount

appropriated, a pro rata reduction is required under 25 U.S.C. §§ 450j-1(b) and 2008(g) (1994). "Simply put," the Government argues, "the law does not require the Secretary * * * to spend more money than the relevant appropriations legislation has provided." (Government's Opposition to Miccosukee's Motion for Partial Summary Judgment at 2.)

Second, relying on *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.2d 1338 (D.C. Cir. 1996) (hereinafter referred to as *Ramah I*), the Government argues that, rather than taking funds from "direct cost" or "program" funding, the courts have clearly sanctioned a pro rata reduction in ACG's whenever the Department's total OIP appropriations are insufficient for both full program and indirect cost funding. It cites *City of Los Angeles v. Adams*, 556 F.2d 40 (D.C. Cir. 1977), in support of a pro rata reduction whenever there is an overall shortfall in appropriations.

Third, citing *Lincoln v. Vigil*, 113 S. Ct. 2024, 2031 (1993), the Government asserts that the Department has no duty to provide full funding for ACG's because no funds were ever specifically appropriated for that purpose; and thus, the allocation of the lump-sum OIP funds that were appropriated was left to agency discretion. Although the Government readily admits that reprogramming funds to fully fund ACG's is *legally* possible citing the General Accounting Office's (hereinafter, GAO's) (*Principles of Federal Appropriations Law*, 2d ed., vol. II, 6-159), it argues that such an action is both highly undesirable for political reasons and not legally required.

Fourth, the Government strongly emphasizes the importance of keeping faith with the Congress in not

expending more than the Appropriations Committee intended for any particular function, noting that not adhering to the allocations prescribed in the Committees' reports or agreed upon as a result of staff negotiations with the Committees could result in further funding reductions for the program in future years.

B. Arguments by Appellants

Appellants place their primary emphasis on the mandatory language directing full indirect cost funding contained in both the TCSA and the ISDA, arguing that the Department has a legal duty to pay 100 percent of their ACG's, as determined by the statutory formula, as well as 100 percent of their CSC's, as negotiated between the tribal contractor and the OIG. They stress the language of S. Rep. No. 274, 100th Cong., 2d Sess. 2632 (1988), to the effect that "[f]ull funding of tribal indirect costs associated with self-determination contracts *is essential if the federal policy of Indian self-determination is to succeed*," (Miccosukee motion for partial summary judgment; emphasis in brief), and they note that this language accompanied the 1988 amendments adding mandatory contract support provisions to the ISDA.

Miccosukee points out that its agreement with the OIG was entered into at the beginning of the school year, on September 29, 1993, whereas the BIA's letter stating that it had unilaterally reduced Miccosukee's CSC distribution was not received until June 1994, 9 months later. Thus, Miccosukee was belatedly forced to absorb the entire cost of the shortfall at the very end of the school year. Citing 25 U.S.C. § 2008(a)(1)(A) (1994), Miccosukee

argues that the purpose of ACG's, like the purpose of the CSC's, was to ensure that tribes would not be forced to compromise their programs by siphoning off program dollars for overhead costs.

For example, the BIA told Congress that it was unable to cover more than 65 percent of the administrative costs of TCSA-funded schools in school year 1992-93, (DOI Budget Justification, fiscal year 1994). But the Department did not request any additional funding for fiscal year 1993, despite the addition of three more eligible TCSA schools before the budget was submitted. As a result, in its report accompanying the fiscal year 1993 appropriation Act, the Congress noted:

> The managers are concerned at the failure of the Department and the Bureau to inform the Committees of shortfalls in funding, and the lack of effort to address these shortfalls. The managers direct that the Bureau provide a quarterly report on projected shortfalls to the Committee during fiscal year 1993, including proposed methods to address these shortfalls.

H.R. Conf. Rep. No. 102-901, 2nd Sess., accompanying Pub. L. No. 102-381, 106 Stat. 1374 (1992).

Alamo asserts that the BIA has never made an effort either to request adequate appropriations or to reprogram funds sufficient to fully fund ACG's, even though at least once during the 4 years of Alamo's claims the BIA actually did reprogram funds for other purposes. The basic legal issue in this case, in Alamo's view, is whether the BIA had the legal duty to reprogram funds to make up the shortfall in ACG's, a mandatory statutory payment, for the years in question.

Appellants contend that "[d]etermining whether there is a legal duty depends upon the statutory language creating the right to the money and the law appropriating the funds." They maintain that "[t]his Board can decide this legal question without reference to whether the money is available to reprogram," (Appellants' July 17, 1997, Reply to BIA's June 18 memorandum in Response to Oral Argument Statements at 4).

Like the Government, Appellants point out that all funds in a lump-sum appropriation that are not specifically earmarked are available for reprogramming by the agency to meet its obligations. They also quote GAO's *Principles of Federal Appropriations Law*, 2d ed., vol. I, 2-25, which states that "[t]he authority to reprogram is implicit in any agency's responsibility to manage its funds; no statutory authority is necessary."

Unlike the Government, however, Miccosukee asserts that while the appropriations limitation in the fiscal year 1994 appropriations Act, (Factual statement (FS) 13), may delay payment, it does not defeat the ultimate obligation of the Government to pay its statutory and contractual debts, because the BIA has a "continuing obligation to fund" CSC's under the authorizing Act, absent clear language "modifying or repealing, expressly or by clear implication, the substantive law," citing *New York Airways, Inc. v. United States*, 369 F.2d 743, 748-49 (Ct. Cl. 1966), upon which Miccosukee primarily relies to support its CSC claims, (Miccosukee's Motion for Partial Summary Judgment brief at 19-20).

IV. DISCUSSION

A. The Ramah Cases

We will not attempt to provide here a detailed description of the indirect cost procedures of the ISDA and the TCSA, partly because the circuit courts in *Ramah I, supra,* and *Ramah Navajo School Chapter v. Lujan,* 112 F.3d 1455 (10th Cir. 1997) (*Ramah II*), have already done so, and partly because without any prior knowledge of the *Ramah* cases, it would be difficult for the reader to comprehend fully the complexity of the statutory procedures and the issues involved in these appeals.

This Board also had occasion, a decade ago, to deal with similar issues and principles. *Navajo Community College,* IBCA No. 1834, 87-2 BCA ¶ 19,825 (modified on other grounds, 87-2 BCA ¶ 19,826) (*cf. Ramah I*), and *Devil's Lake Sioux Tribe,* IBCA No. 1953, 88-1 BCA ¶ 20,320 (*cf. Ramah II*). Although both Board decisions were written before the 1988 amendments to the Acts involved here, they are relevant here because they arrived at similar results even in the absence of an explicit statute; specifically, that contracts and agreements are to be honored, even Government contracts with Indian tribes.

Similarly, neither of the *Ramah* cases is actually controlling in these appeals because each of them dealt with a narrower issue. Moreover, *Ramah I*'s general comments concerning the necessity of pro rata allocations when there are shortfalls in overall funding, heavily relied upon by the Government, were clearly only dicta. *See United States v. Daniels,* 902 F.2d 1238, 1241 (7th Cir. 1990) ("Judicial assumptions concerning, judicial allusions to,

and judicial discussions of issues that are not contested are not holdings"; citations omitted).

In addition, *Ramah I* involved a fiscal year 1995 appropriations Act, and *Ramah II* involved a fiscal year 1990 appropriations Act; whereas, these appeals involve appropriations Acts between fiscal year 1990 and fiscal year 1994.

Nevertheless, the holdings in the *Ramah* cases, and the related rationales of the two Federal Circuits in these decisions, are highly relevant to these appeals. Both cases shed light on the intent of Congress with respect to the mandatory provisions of the ISDA and the TCSA concerning indirect costs.

In *Ramah I*, the district court, relying on *Lincoln v. Vigil, supra,* had held that the method of allocating insufficient appropriations to CSC's was committed by law to agency discretion and therefore was not judicially reviewable. On appeal, however, the circuit court found no support in the text or history of the ISDA or in prior case law for that conclusion. The circuit court stated unequivocally that "Congress has clearly expressed in the ISDA both its intent to circumscribe as tightly as possible the discretion of the Secretary," (citing section 450k(a)), and that "the statute itself reveals that not only did Congress *not* intend to commit allocation decisions to agency discretion, it intended quite the opposite; Congress left the Secretary with as little discretion as feasible in the allocation of [CSC's]." 87 F.3d at 1344.

The sole issue in *Ramah I* was whether the Secretary could impose a 50-percent reduction in the CSC funds of any tribe that did not submit a proposal justifying its

fiscal year 1995 indirect cost rate by a given date. The court held that such a penalty was beyond the Secretary's authority.

In *Ramah II*, the OIG and the Tribe had disagreed on whether to include two state contracts as part of Tribe's direct cost base for the purpose of determining its CSC indirect cost rate under section 450j-1(a)(2) and (d). The OIG wanted to include them, since the larger the direct cost base, the lower the CSC rate and the lower the entitlement. Again, the district court had found for the Secretary. But the 10th Circuit found the authorizing statute ambiguous and, rather than finding for the agency as it might otherwise have done, held that in Indian cases the normal rules of statutory construction do not apply and that ambiguous provisions must be interpreted for the Indians' benefit, citing *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991), *inter alia*.

See Also Commonwealth of Massachusetts v. United States Department of Transportation, 93 F.3d 890, 893 (1996), in which the District of Columbia Circuit once again acknowledged that statutes must be construed liberally in favor of Indians, with ambiguous provisions interpreted to the Indians' benefit.

The court in *Ramah II* also found support for its holding in the legislative history of the 1988 amendment, which were "inteded to assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities," 112 F.3d at 1461, quoting from S. Rep. No. 274, 100th Cong., 1st Sess., 1-2 (1987). The court concluded,

"We therefore agree with plaintiff that the 1988 amendments to the Act mandate that tribes executing self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts," *ibid.* at 1463.

The Congress is fully capable of enacting either discretionary or mandatory language, whichever it intends, in its authorizing statutes, depending on their purpose. *See, e.g., American Telephone & Telegraph Co. v. United States*, CAFC No. 95-5153, Sept. 24, 1997, at 17 ("Congress knows how to impose mandatory provisions in contracts"). As to discretionary language, *see*, for example, 25 U.S.C. § 450h(a) (1994), which begins: "The Secretary of the Interior *is authorized* * * * to contract with or make a grant or grants to any tribal organization," etc., and section 450h(b), which begins: "The Secretary of Health and Human Services *may* make grants to any Indian tribe or tribal organization," etc., (emphasis added).

By contrast, section 450j-1(a)(2) begins: "There *shall* be added to the amount *required* by paragraph (1) contract support costs which *shall* consist of," etc. Paragraphs 2008(a)(1) and (b)(1), similarly begin, "(1) The Secretary *shall*, subject to the availability of appropriated funds, provide grants," etc., and "(2) The amount of the grant * * * *shall* be determined," etc.

In *Commonwealth of Pennsylvania v. Weinberger*, 367 F. Supp. 1378, 1381 (D.D.C. 1973), the court noted that "[s]tatutory language that an official 'shall' perform an act has been repeatedly held to be mandatory in nature [citations omitted]. *It deprives the official of discretion and makes the commanded act a duty, a ministerial act,*"

(emphasis added). Although this view is completely consistent with the D.C. Circuit's analysis in *Ramah II*, the issues in this case require that we also construe the "subject to the availability of appropriated funds" language in both the ISDA and the TCSA.

B. Availability of Unrestricted or Lump-Sum Appropriations

The parties to these appeals presumably would not deny that the Congress typically provides the Secretary with far more discretionary than earmarked funds in the Department's annual lump-sum OIP appropriation. The Government argues, however, that the BIA must keep faith with the Congress by using these discretionary funds in the manner requested in the Department's budget presentations, or as subsequently specified in the applicable committee reports, as the case may be. But Appellants assert that the mandatory language concerning CSC's and ACG's in the authorizing legislation has priority and that, if necessary, the Secretary must reprogram discretionary funds in order to fully fund the mandatory indirect cost entitlements.

Both parties accept the "fundamental principle" set forth by the Supreme Court in *Lincoln v. Vigil, supra*, that where

> Congress merely appropriates lump-sum amounts *without statutorily restricting what can be done with those funds*, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds

> should or are expected to be spent do not establish any requirements on the agency.

113 S. Ct. at 2031 (emphasis added). But the Government clearly errs in ignoring the statutory constraints *in the substantive legislation* upon which the annual appropriation is based, which govern the use of funds in the absence of later statutory language.

Thus, Appellants must prevail. *See International Union v. Donovan*, 746 F.2d 855, 860-61 (D.C. Cir. 1984), in which the court said: "The issue here is not how Congress expected or intended the Secretary to behave, but how it *required* him to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything – the enactment of legislation."

In essence, the lack of any earmark in an appropriation Act simply means that the Congress does not intend to change whatever prescriptions are already contained in the authorizing statute. Therefore, before using any funds from its lump-sum OIP appropriation for discretionary purposes, the BIA has a clear obligation to first give priority to the various mandatory programs and activities of the ISDA and the TCSA, including indirect costs. The Department has no discretion in this matter. *Ramah I, supra.*

That is not to say that the BIA cannot reduce the amounts of its direct grants under these programs whenever there are shortfalls in the Department's current OIP appropriation. Obviously it can and must do so. If there is a resulting reduction in a tribal organization's direct cost base, it necessarily follows that there will be a shortfall in its indirect cost funding. But BIA must still apply

to the total reduced direct cost base the precise indirect cost percentage rates that have previously been determined pursuant to the ISDA and TCSA statutory formulations.

It would appear that the easiest method of achieving the required result would be for the BIA, upon receipt of an annual OIP lump-sum appropriation, to first determine the fair proportion of total funds to which a given tribal organization is entitled under whatever criteria are appropriate, and then to apportion that amount between direct and indirect funding by simple arithmetic, as the substantive Acts would seem to have contemplated in the absence of line-item funding.

But, we hasten to add that our assumption as to the best manner of making primary allocations among tribes is no less dictum than that of the *Ramah I* court in its preference for pro rata allocations. What *is* required, with respect to the issues before us, is that ISDA and TCSA indirect cost rates not be reduced in order to increase direct or program funding. It obviously would accomplish little if a tribal school were given additional discretionary funds for its academic programs but were unable to pay its lighting and heating bills.

Thus, our first conclusion is simply that, in making allocations and disbursements for indirect costs under contracts and grants pursuant to the ISDA and the TCSA, and funded under unrestricted lump-sum appropriations enacted by the Congress for OIP programs generally, the Department remains bound by the mandatory language of the authorizing legislation, despite shortfalls in the total amounts appropriated, because in providing indirect

costs under these Acts, the Department is performing an essentially ministerial function. It has no authority to modify administratively the clear statutory mandates giving priority to indirect costs. *Ramah I.*

Similarly, absent a specific revision of the authorizing legislation by either an amendment of the substantive Act or a clear provision in an appropriations Act, the Department has no authority to change either the direct cost base (multiplicand) by which an indirect cost rate is to be multiplied or the percentage rate (multiplier) that is determined either by agreement with the Inspector General or by statutory formula.

It follows that the restriction in the authorizing Acts, to the effect that the Indian tribes' entitlement to full funding of their indirect costs is subject to the availability of appropriations, simply does not apply where the current OIP appropriation is in the form of an unrestricted lump-sum amount that is more than sufficient to cover such mandatory funding and where the Department's current appropriations Act lacks any statutory earmark affecting the use of funds for such purposes.

C. Indirect Cost Funding under Earmarked Appropriations

1. Legal Background

Unlike the foregoing situation where ACG costs are funded under lump-sum appropriations, and where there is clearly no *legal* objection to the reprogramming of discretionary funds in order to fully fund mandatory payments, the obligations of the Secretary in situations

where mandatory funding needs exceed the amount of an earmarked appropriation are not immediately evident. But, the basic principles governing the latter situation had nevertheless existed for well over a century and perhaps since the early days of the republic.

As we have seen, (FS 13), for fiscal year 1994 the Congress imposed an indirect cost limitation, or earmark, of $91,223,000 for ISDA payments, which apparently was insufficient for full funding of the indirect costs to which tribal organizations were entitled under the ISDA contracts they had entered into with the OIG, (FS 14). As a result, Miccosukee received only 81.21 percent of the amount to which it claimed entitlement under its OIG contracts, (FS 15), and the CO subsequently denied its claim for the rest of its entitlement, (FS 17).

The issue, therefore, is whether Miccosukee is entitled to full funding through a judgment by this Board. Based upon our extensive, and fairly exhaustive, research of the relevant cases, we have determined that the answer is yes. As the Supreme Court said in *United States v. Bostwick*, 94 U.S. 53 (1876), involving damage to property leased for the use of Union troops during the Civil War, "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them," 94 U.S. at 66.

That principle remains unchanged to this day. *See, e.g.*, the discussion of contracts in *United States v. Winstar*, 116 S. Ct. 2432, 2455-65 (1996), quoting Justice Brandies in *Lynch v. United States*, 292 U.S. 571, 580 (1934), that

"[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors," a quotation that apparently originated in the *Sinking Fund Cases*, 99 U.S. 700, 718-19 (1879). *See also Perry v. United States*, 294 U.S. 330, 351-52 (1934) ("When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference * * * .")

Thus, in *Collins v. United States*, 15 Ct. Cl. 22 (1879), decided 3 years after *Bostwick*, the Court of Claims stated:

> On the part of the defendants it is further objected that the claimant cannot recover in this action because there is no appropriation of money for the payment of this claim; and that clause of the Constitution which says that "no money shall be drawn from the Treasury but in consequence of appropriations made by law" is cited in support of this objection (Con., Art 1, § 9, cl. 7).
>
> That provision of the Constitution is exclusively a direction to the officers of the Treasury, who are intrusted with the safe-keeping and payment out of the public money, and not to the courts of law; the courts and their officers can make no payment from the Treasury under any circumstances.
>
> This court, established for the sole purpose of investigating claims against the government, does not deal with questions of appropriations, but with the legal liabilities incurred by the United States under contracts, express or

> implied, the laws of Congress, or the regulations of the executive departments.

15 Ct. Cl. at 35.

This Board, of course, has the same jurisdiction in deciding appeals involving Government contract claims as the Court of Federal Claims, which succeeded the United States Claims Court and, previously, the United States Court of Claims, with respect to that function, 41 U.S.C. § 607(d) (1994).

In the appeals before us, the Government does not *expressly* argue that the earmark in the fiscal year 1994 appropriations Act repealed the provision of the ISDA authorizing CSC contracts for indirect costs to be entered into between a tribal organization and the OIG. But, as Appellants note, if the Board were to decide that Miccosukee has no legal recourse to recover the expenses that it had already incurred in performing its BIA functions in reliance on its OIG contract, at the time the reduction in appropriations for CSC's was first announced by the BIA, then the limitation in the appropriations Act would have the effect of amending or repealing the authorizing statute.

About such repeals by implication, the Supreme Court in *TVA v. Hill*, 437 U.S. 153, 190 (1977), a century after the two cases quoted above – and citing *Morton v. Mancari*, 417 U.S. 535, 549 (1974), and *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) – said that "the intention to repeal must be clear and manifest." Quoting from *Georgia v. Pennsylvania R. Co.*, 324 U.S 439, 456-57 (1945), the Court concluded that "[o]nly a clear repugnancy between the old * * * and the new [law] results in the

former giving way." The Court emphasized that, "[t]he doctrine disfavoring repeals by implication applies with full vigor when * * * the subsequent legislation is an *appropriations* measure," (citations omitted).

Whether the Government is bound by a transaction is essentially independent of the form of the transaction. *See, e.g.*, discussion in *Winstar v. United States*, 64 F.3d 1531, 1547-50 (Fed. Cir. 1995) ("The terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change," 64 F.3d at 1547), *aff'd United States v. Winstar*, 116 S. Ct. 2432 (1996) ("The government's position * * * would [conflict] with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies," 116 S. Ct. at 2459.

Even if a CSC agreement were considered, *arguendo*, to be merely a form of grant arrangement rather than a bilateral contract, a grant entitlement can still trigger Government liability, as GAO noted in the chapter on Federal Assistance: Grants and Cooperative Agreements, in its *Principles of Federal Appropriations Law*, 2d ed., vol. II, 10-8 & 10-9. Quoting the Claims Court in *Community Relations-Social Development Commission v. United States*, 8 Cl. Ct. 723 (1985), GAO notes that even "a notice of a federal grant award in return for the grantee's performance of services can create cognizable obligations to the extent of the government's undertakings therein."

The Claims Court itself stated in the above case, 8 Cl. Ct. at 725:

> Defendant contends that this court lacks jurisdiction to consider the claim because plaintiff's grant is not the type of contract on which the United States has consented to be sued pursuant to 28 U.S.C. § 1491.
>
> Defendant contends that a grant is not a contract, as it evinces no contractual language or intent to be bound. This question, however, has already been laid to rest by the Court of Claims, which has held that a notice of a federal grant award in return for the grantee's performance of services can create cognizable obligations.

Citing Missouri Health & Medical Organ., Inc. v. United States, 226 Ct. Cl. 274, 278-79, 641 F.2d 870, 873 (1981).

Missouri Health is indeed specific in this respect: "Defendant is mistaken in its position that an obligation which is enforceable in this court can only be evidenced by a contract duly executed by the parties. An instrument, other than the traditional formal contract, can create obligations which are cognizable in this court," 226 Ct. Cl. at 278.

The GAO summarizes this principle as follows: "Thus, if a grantee does what it has committed itself to do and incurs allowable costs, the government is obligated to pay," *ibid.* at 10-9.

It must also be noted that contractual and quasi-contractual obligations between the Government and Indian tribes may well rise above the level of ordinary contracts. As this Board said in *Devil's Lake Sioux Tribe, supra*, (88-1 BCA at 102,733), quoting from *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942):

> With respect to Indian treaty obligations * * * the Government is "something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

This principle even applies to legislative actions. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the United States Supreme Court reversed a decision by the Minnesota Supreme Court which assumed that Minnesota had a right to impose a $147.95 tax on a mobile home on Indian trust land because the right of taxation had not been expressly excluded by the Federal statute in question, 28 U.S.C. § 1360 (1994), which gave Minnesota jurisdiction over civil causes of action between Indians. The Supreme Court adhered to the view that it had expressed in *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973), dealing with a claim that an Indian reservation had been terminated by Congress. In that opinion, because clear language was not employed by Congress, no intent to terminate could be inferred. "A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."

Furthermore, as the Supreme Court noted in *Quick Bear v. Leupp*, 210 U.S. 50, 81 (1907), in connection with a controversy over the use of moneys appropriated for Indian educational purposes:

> The President declared it to be the moral right of the Indians to have this "Trust Fund" applied to the education of the Indians in the schools of their choice, and the same view was entertained by the Supreme Court of the District of Columbia and the Court of Appeals of the District. But the "Treaty Fund" has exactly the same characteristics. They are moneys belonging really to the Indians. They are the price of land ceded by the Indians to the Government. The only difference is that in the "Treaty Fund" the debt to the Indians created and secured by the treaty is paid by annual appropriations. *They are not gratuitous appropriations of public moneys, but the payment, as we repeat, of a treaty debt in installments.* We perceive no justification for applying the [nonsectarian use of funds] proviso or declaration of policy to the payment of treaty obligations, the two things being distinct and different in nature and having no relation to each other, except that both are technically appropriations.

(Emphasis added.)

Although we have made no attempt to trace the likely evolution of "treaty fund" payments (i.e., those owed to the various tribes that voluntarily or involuntarily surrendered their lands to the Government in the course of this nations's westward expansion) into routine annual appropriations, we note that in *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir. 1981), the court said that "[i]t is fairly clear that *any* Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes," citing *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

2. Applicable Case Law Generally

However, this Board does not have to depend on the Federal Government's special relationship to Indians for a favorable decision in Miccosukee's behalf. Among the early cases cited by the Government in opposing full funding of indirect costs, in situations where the appropriations Act contains a contrary earmark, is *Shipman v. United States*, 18 Ct. Cl. 138 (1883), in which the court said that "where an alleged liability rests *wholly* upon the authority of an appropriation they must stand and fall together, so that when the latter is exhausted the former is at an end, to be revived, if at all, only by subsequent legislation by Congress," 18 Ct. Cl. at 147 (citations omitted; emphasis added).

The implication of the Government's use of this quotation can only be that there is no real basis for CSC funding except the appropriations Act itself. However, the Government ignores the *Shipman* court's own explanation of this principle, 18 Ct. Cl. at 146-47, which is as follows:

> The liability in *this* case rests *wholly upon the appropriation, and is different from* those cases which frequently arise wherein Congress passes an act authorizing officers to construct a building or do other specified work, without restriction as to cost, and then makes an appropriation inadequate to do the whole of it or makes none at all.
>
> *In such cases the authority to cause the work to be done and to make contracts therefor is complete and unrestricted.* All work, therefore, done under the direction of the officers thus charged with

> the execution of the law creates a liability on the part of the Government to pay for it, and if a written contract be made and work be done in excess of the contract-specifications, or entirely outside of or in addition to the written contract, and such work inures to the benefit of the United States, in the execution of the law, or is accepted by the proper public officers, a promise to pay its reasonable value is implied and enforced.
>
> *We have frequently held that where there is liability on the part of the Government, it is not avoided by the omission on the part of Congress to provide the money with which to discharge it.*

Citing Collins Case, supra, at 35 (emphasis added).

It should also be noted that the Court of Claims decided *Dougherty v. United States,* 18 Ct. Cl. 496 (1883), in the same year as *Shipman's Case.* In *Dougherty,* the court commented on *Shipman* as follows, 18 Ct. Cl. 503:

> We held in Shipman's Case, this term (ante 138), that when *one contract on its face* assumes to provide for the execution of *all the work authorized* by an appropriation, the contractor is bound to know the amount of the appropriation, and cannot recover beyond it; *but we have never held that persons contracting with the Government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department.* To do so might block the wheels of the Government. The statutory restraints in this respect apply to the official, but they do not affect the rights in this court of the citizen

> honestly contracting with the Government. (Rev. Stat. §§ 3679, 3732.)

(Emphasis added.)

The Government also alleges that *Sutton v. United States*, 256 U.S. 575 (1921), supports the proposition that the United States is not liable for work performed in excess of an appropriation, contending that any contractual right of Miccosukee to entitlement is expressly subject to funding limitations. It relies heavily on *Republic Airlines, Inc. v. United States Department of Transportation*, 849 F.2d 1315, 1320 (10th Cir. 1988), which in turn cities *United States v. Dickerson*, 310 U.S. 554, 555 (1940), for the proposition that Congress can in fact amend substantive legislation through an appropriations act.

The Government's reliance is misplaced, however, since the court in *Republic* itself clearly distinguishes the case before it from *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), upon which Appellants rely. As the court in *Republic* said, at 849 F.2d at 1322:

> [T]he major premise upon which the *New York Airways'* decision rests is that the appropriations act in question did not clearly express Congress' intention to modify the underlying statute. The appropriations act did not mention [the authorizing Act], and the relevant legislative history left no doubt that the Congress knew it was not altering obligations [under the authorizing Act] *and did not so intend*. Quite the opposite situation is before us. The appropriations acts [in *Republic*] * * * clearly reflected Congress' intention to curtail and phase out [the authorizing Act.]

(Emphasis added.)

The appropriation language in *Dickerson*, moreover, contained a clear *prohibition* against the use of the funds for the purpose at issue, notwithstanding the authorizing legislation, 310 U.S. at 555. That is not the case here.

We also note that in *City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977), frequently cited by the Government for other purposes, the court said:

> When Congress modifies a statute by an appropriations measure, or any other amendment, the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint. [The appropriations Act] only restricted the *amount* the FAA could obligate. [It] said not a word about the method of distributing the money available. We hold that the FAA was required to distribute the money available so as to preserve the allocation formula provided by [the authorizing Act.]

Thus, the obvious answer to the Government's contentions in reliance on cases like *Sutton*, *Republic*, and *Dickerson* is that the Congress not only did not amend the substantive legislation in the appeals before us, but it evinced no inclination to do so. Therefore, the mandatory indirect cost priorities contained in the ISDA and the TCSA still apply.

Rather than conceding the applicability of *Sutton* and *Dickerson*, Appellants rely on such cases as *Ferris v. United States*, 27 Ct. Cl. 542 (1892), and *Ross Construction Corp. v. United States*, 392 F.2d 984 (Ct. Cl. 1968). We will discuss *Ross* later.

In *Ferris*, 27 Ct. Cl. at 546, the court said:

> A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation *per se* merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties. (*Dougherty's Case*, 18 C. Cls. 496.)

The GAO has clarified the distinction between *Ferris* and *Sutton* as follows (*Principles of Federal Appropriations Law*, 2d ed., vol. II, 6-18):

> The distinction between the *Ferris* and *Sutton* lines of cases follows logically from the old maxim that ignorance of the law is no excuse. If Congress appropriates a specific dollar amount for a particular contract, that amount is specified in the appropriation act and the contractor is deemed to know it. It is certainly not difficult to locate. If, on the other hand, a contract is but one activity under a larger appropriation, it is not reasonable to expect the contractor to know how much of that appropriation remains available for it at any given time. A requirement to obtain this information would place an unreasonable burden on the contractor, not to mention a nuisance for the government as well.

Perhaps it would not be inappropriate at this point to point out that even this Board was unsuccessful in its

effort to learn exactly how OIP funds are allocated and apportioned by the BIA. During oral argument, the following exchange occurred:

> JUDGE PARRETTE: What I'm getting at is not so much the numbers, but if this really is a pass-through operation, why is there money left over?
>
> MS. BARBERO: Judge, I think that's a very good question. And I don't know the answer to that. In FY '93, there was nearly $8 million left over, unexpended from Operation of Indian Programs. * * *
>
> MR. DEAN: * * * Just to clarify why there may be unexpended funds, it's not a total pass-through operation in that the Bureau continues to operate programs, administer programs, they continue to have vacant positions, and over the years in the past, there have often been years in which the bureau doesn't spend all of its money. It's rare that they come down right on the dot.
>
> So, while the bureau has sometimes said that all of our funds are sort of provided to this tribe and that tribe and that tribe, the fact remains that there end up being funds which, unless they are spent in some way for Indian service programs, will go back to the Treasury.

(Transcript at 141-43.)

Subsequent to oral argument, the BIA belatedly informed the Board that there are several variables affecting the BIA's ability to estimate accurately and secure in advance the amount of funding sufficient for ACG's and CSC's. Among those mentioned, were that (1) during a given year, other tribes may take over some BIA functions

and thus cause changes in funding allocations; (2) 2 fiscal years are involved in each school year; (3) the formula for determining the amount of school grants is complex and based on the number of students then enrolled; (4) school funding begins on July 1 preceding the next fiscal year's appropriation, and adjustments then must be made based on the actual appropriation; (5) CSC ratios are based on past overhead costs, which may change during the coming fiscal year; and (6) the BIA budget request must be submitted to the Department and then to the Office of Management and Budget in the February before the actual fiscal year begins; and numerous changes may occur before that budget is presented to the Congress, which then may make its own changes.

The point to be made, in the context of the *Ferris* versus *Sutton* line of cases, is that if this Board, after a full oral briefing, could not ascertain with precision how OIP funds are allocated after they are appropriated, then how can an Indian tribe – particularly one associated with a remote western reservation, like Alamo – be expected to know the status of their funding in advance of the BIA's allocation?

Surely, all the Indian tribes can be expected to know are the indirect cost percentages by which their entitlements are to be multiplied under the contract and grant agreements they have signed with the BIA in accordance with the formulas that Congress itself previously prescribed – indeed, previously mandated. Thus, Indian tribal agreements with the BIA clearly fall within the *Ferris* category, where the contractor cannot be charged with knowledge of the availability or unavailability of

appropriations, rather than within the *Sutton* case category where the contractor is deemed to know the status of its line-item appropriation.

D. Cases Principally Relied on by the Parties

We have already discussed both *Ramah I*, relied on by the Government, and *Ramah II*, relied on by Appellants, sufficiently that we will not discuss them again here.

1. The Procurement Cases

In *Meyne v. United States*, 110 Ct. Cl. 527 (1948), the contractor was to construct temporary buildings on an Army fort using paved roads which the Government promised would be available for access; but when the contractor was ready to begin, military authorities ordered the paved roads closed, and the contractor had to construct and pave alternate access roads. The court granted recovery, explaining that the Government "cannot enter into a binding agreement that it will not exercise a sovereign power [i.e., its right to close the roads], but it can say, if it does, it will pay you the amount by which your costs are increased thereby," *ibid.* at 550, citing *Bostwick, supra*. Thus, the exercise of a sovereign power does not alter existing contractual obligations

In *Miller v. United States*, 348 F.2d 475, 172 Ct. Cl. 60 (1965), a Capehart housing contractor's Government-caused overruns forced it to exceed the $16,500 cost-per-unit mortgage financing limitation in the National Housing Act. Allowing recovery of the excess, the court, 172 Ct. Cl. at 68, said:

> Concededly, Congress did not, in specific terms, provide that a contractor may be reimbursed for expenses incurred (in excess of the mortgage proceeds) for additional work caused by errors or defects in the government's plans and specifications or required by changed conditions encountered in the performance of the contract. Nevertheless, we find it difficult to conclude that Congress meant that the contractor would remain without a remedy in all such cases. Therefore, we will not attribute to Congress an intention that would produce an impractical, unjust, and unworkable result unless that intention appears clearly on the face of the statute or in the supporting record.

In *Ross v. United States*, 392 F.2d 984, 986 (Ct. Cl. 1968), another Capehart housing case, the court, citing *Miller*, also refused to penalized the contractor for Government-caused overruns, stating that "absent the most explicit of statutory language, a Congressional limitation on expenditures should not be read as excluding recovery for circumstances over which the contractor could have no control and which were not its fault." The court went on to add:

> For years this court has made a distinction between contractors paid out of a general appropriation and those contracts for which a specific and limited appropriation is made by Congress. The former have been held not barred at all by exhaustion of the appropriation, on the theory that "a contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or

> impaired by its maladministration or by its diversion, legal or illegal, to other objects."

Citing Ferris, supra, and other cases.

In *Healy v. United States,* 576 F.2d 299, 216 Ct. Cl. 172 (1978), the contractor sued to recover the extra costs resulting from shutting down, and then resuming, a construction project when the Government ran out of funds. This Board had denied the appeal on the ground that the work stoppage would not have occurred if the contractor had adhered to the approved construction program, since the supplemental appropriation needed for completion was in fact passed shortly after the shutdown. But the contractor argued in the Court of Claims that the stoppage had resulted from the Government's prior actions in budgeting and requesting inadequate appropriations for the project. The court agreed. It held, 576 F.2d at 307-08, that

> the protective umbrella of the *funds available clause,* as worded in this contract, does not extend to an exhaustion of funds occasioned by the agency's decision to request funding grossly inadequate to support the level of earnings approved by the agency for the fiscal year. In order not to be misunderstood, we add at this point we are not holding that under this contract the defendant's executive branch was contractually obligated to request from defendant's legislative branch appropriations adequate to fund continued performance. It may well have been free to decide it would request any level it pleased. We hold only that (a) a contract will not be construed to throw all the cost and loss necessarily incident to such a decision on the contractor, and none of it on the party whose

> decision occasioned the loss, unless the clauses of the contract require that result without ambiguity, and (b) that a government agency that claims a right to do this is under an implied obligation to assist its contractor, by timely and candid information, to take the measures that the latter may deem best to diminish and mitigate its loss.
>
> * * *
>
> The [IBCA] has lost sight of the fact that *it was the government which initially repudiated and discredited the approved program by choosing not to budget adequate funds* to finance the scale of construction called for in the program. The Board itself takes the anomalous position that Healy should be bound by the approved schedule when the government in fact displayed no intent to be bound by it in any way whatsoever.

(Emphasis added.)

It takes very little imagination to perceive an analogy between the funding actions of the Department's Bureau of Reclamation in *Healy* and those of the BIA in this case. *See* quotation from the Appropriations Conference Committee that follows the third paragraph in the summary of Appellant's arguments, *supra*, setting forth the Committee's concern over BIA's failure to address repeated shortfalls in Indian program funding.

Finally, *Blackhawk v. United States*, 622 F.2d 539 (Ct. Cl. 1980), involved a construction contract settlement agreement that said the Government's liability was "contingent upon the availability of appropriated funds from which payment in full can be made," a provision

intended to free the Government from liability if Congress took affirmative action to prevent payment. The case involved the meaning of the quoted language and whether such an unavailability of appropriated funds had actually occurred. The contractor was aware that a reprogramming of funds would be required to pay the settlement amount but, contrary to the Government's later assertion, apparently did not know that congressional approval would be requested for it. The court notes that, in fact, such approval was *not* legally required; but when the agency sought it anyway, the Congress balked and instead enacted a law intended to deny the necessary funds.

The court described the reprogramming procedure as nothing but "an informal working arrangement between the agency and the congressional appropriations committees with whom the agency had to deal" and notes that "a failure on the part of the agency to observe the requirements of its reprogramming procedure could offer no legal basis for challenging the Legality of the expenditure involved," *ibid.* at 548. The court further said that "[a]fter-the-fact rationalizations cannot obscure what [the Government's] actions so plainly show: it was obedience to political pressure rather than allegiance to established procedures which dictated the decision not to go forward with the reprogramming," *ibid.* at 550, and that "the Government's failure to have paid timely, and in full, the first principal payment due under the settlement agreement was a breach of contract," *ibid.* at 552. But, because of the condition in the agreement, once Congress had placed a specific subsequent limit on the use of appropriated funds for the payment of settlement agreements

generally, clearly having this case in mind, the contractor lost its right to any payments not already vested, *ibid.* at 553-54.

Blackhawk, of course, is unusual in that Congress, rather than approving the legally unnecessary reprogramming request, chose to deny the agency the right to make future payments under the terms of the settlement agreement. However, the case illustrates once against the two basic principles that (1) a contractor is not bound to know the status or balances of an agency's lump-sum appropriations, and therefore is entitled to recover the full amount it is due under a valid contract, including a subsequent settlement agreement; and (2) discretionary funds *can* legally be reprogrammed without congressional consent.

2. The Quid-Pro-Quo Entitlement Cases

One of the earliest types of cases that arose in the Court of Claims had to do with attempts by the Congress to reduce the amount of remuneration received by military and diplomatic employees during their term of office or period of entitlement. Some of these cases were appealed to the Supreme Court. In *United States v. Langston,* 118 U.S. 389 (1886), affirming *Langston v. United States,* 21 Ct. Cl. 10 (1886), the headnote says it all:

> A statute which fixes the annual salary of a public officer at a designated sum without limitation as to time, is not abrogated or suspended by subsequent enactments appropriating a less amount for his services for a particular fiscal

> year, but containing no words which expressly or impliedly modify or repeal it.

Citing United States v. Fisher, 109 U.S. 143; and distinguishing *United States v. Mitchell,* 109 U.S. 146. *See also Geddes v. United States,* 38 Ct. Cl. 428 (1903); *Vulte v. United States,* 47 Ct. Cl. 324 (1912), *aff'd* 233 U.S. 509 (1914); and *Gibney v. United States,* 114 Ct. Cl. 38 (1949).

In *Gibney,* the court said, 114 Ct. C. at 53: "We know of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend a statutory obligation. In fact, we believe a careful reading of the Comptroller General's ruling will disclose that he is in accord with this interpretation."

There are numerous cases dealing with situations where the Government required various types of common carriers to haul mail, but then attempted in appropriations bills to reduce the amount of compensation it paid them. The earliest cases involved land-grant railroads, which were required to carry the mail "at such price as Congress by law direct[s]." *See Illinois Central RR v. United States,* 18 Ct. Cl. 118, 127 (1883), in which the court noted that

> [i]n the former case [involving the Northwestern and Milwaukee railroads], which was precisely like this, this court said:
>
> > It is therefore, we think, apparent that so far as their contracts in this suit are involved the parties stand in precisely the same plight that they would be in if the

> roads were not land-grant roads and Congress had prescribed this reduction of the contract rate for all railroads.
>
> The Supreme Court in that case, in the very able opinion delivered by Mr. Justice Matthews, which covers the whole ground, held that the contracts were legal and binding upon both parties for the whole term, and that the Acts of 1876 and 1878, directing a reduction in pay, were not intended to *and could not* affect existing contracts like these.

(Emphasis added.)

Three years later, in *New York Central RR v. United States*, 21 Ct. Cl. 468, 470-72 (1886), the matter involved an 1877 contract that provided that the Post Office would reimburse the carrier out of special appropriations. Congress appropriated the necessary funds for 1877 through 1882, but then discontinued them, and the Post Office denied payment to the carrier. The court said:

> Had Congress made no further appropriation [after June 30, 1877,] for the fiscal year ending June 30, 1878, there would have been an end to the contract, because by its very terms payment was to be made out special appropriations to be made by any act thereafter passed for a similar purpose, and therefore on condition that such appropriations should be made.
>
> But Congress did pass a subsequent act each year, making appropriation for the same or a similar purpose, and thus the condition upon which the contract was to continue was fulfilled. * * *

> When, therefore, at the beginning of each fiscal year the Postmaster-General employed the claimant exactly as provided in the contract, and furnished for transportation the mails in accordance therewith and continued to do so throughout the year, he exercised the discretion intrusted to him, renewed and extended the contract for that year, and the defendants became liable for payment as agreed upon.

Similarly, in *New York Central RR v. United States*, 65 Ct. Cl. 115, 128 (1928), the court said:

> In our opinion, Congress not only did not attempt to reserve power in itself to determine the fair and reasonable compensation the carriers should receive for the service but it intended to place the entire matter in a tribunal fully equipped to perform the judicial duty involved. This duty having been discharged and the amount payable ascertained, the carrier is entitled to judgment. One of the reasons assigned for the nonpayment is the lack of appropriation, and this may be a sufficient reason for the accounting officers or the Postmaster General if the appropriations for the period in question were exhausted. But it furnishes no reason why this court may not render its judgment for the amount due.

In *Seatrain Lines v. United States*, 99 Ct. Cl. 272, (1943), the Postmaster General advertised for a mail route by ship from New Orleans to Havana, which would involve a minimum of 50 trips, but not more than 100, per year. Seatrain was the only bidder, and the contract was signed in December 1931 for a period of 10 years. However, in 1933, Congress attached to the Post Office's appropriation

bill a proviso that no part of the money appropriated should be paid in connection with the contract, so the Postmaster General notified Seatrain that no more mail would be sent on its vessels. In awarding damages to Seatrain, the court said, 99 Ct. Cl. at 315:

> When Congress delegates to an agency of the Government the right to enter into a contract under certain terms and conditions, and these terms and conditions are fully carried out and a contract entered into, it becomes a valid, binding agreement of the Government, and such valid contract is protected by the Fifth Amendment and cannot be taken away without making just compensation.

These earlier transportation cases may be regarded as background to the three airline cases upon which the parties in the present case rely; namely, *New York Airways*, *City of Los Angeles v. Adams*, and *Republic Airlines*, *supra*. However, the later two cases, cited by the Government, do not appear to support its contentions, so we will comment on them only briefly.

In *Adams*, the city of Los Angeles filed an action to compel the Federal Aviation Administration (FAA) to provide a grant to reimburse the city for expenses incurred in expanding its airport, based on a 1970 grant authorization Act that permitted, but did not mandate, the Secretary of Transportation to make grants under a statutory distribution formula for the maintenance and improvement of the national air traffic system. The moneys appropriated were to be divided one-third to the states, one-third to existing airports, and one-third to be distributed at FAA's discretion, 556 F.2d at 44.

Because Congress appropriated a lesser overall amount than FAA had anticipated, FAA decided to allocate less money to the first two purposes and more to its discretionary projects. The court said that this reallocation of funds was improper because Congress had merely reduced the amount of the appropriation and had not said a word about the method of distributing the money available, *ibid.* at 500. As Appellants point out, this is a far different situation from the mandatory CSC contracts that the BIA is required to enter into, which establish an annual ratio based on individual needs and apply that ratio to the total of program funds actually distributed. If anything, *Adams* supports the holding in *Ramah I* that a mandatory allocation of funds prescribed by statute limits an agency's discretion in making use of them.

In *Republic,* another Postal Service case, Congress expressly amended the provisions of the local airline subsidy program Act for 2 years in a row, and then terminated the program as of a future date certain, using "notwithstanding" language in the appropriations Act and referring specifically to the section of the Federal Aviation Act that was being terminated. No contractual obligations were involved; the plaintiff airlines simply asserted that "Congress intended * * * to create an entitlement which was to survive appropriations actions." The court was not persuaded, 849 F.2d at 1319. Neither are we, with respect to *Republic's* similarity to the case before us.

[5] We do, however, find sufficient similarity in *New York Airways* to justify Appellants' reliance on it. In essence, this case follows the earlier line of transportation cases which hold that once a carrier has performed in

reliance on a Government offer or directive, it is entitled to be paid, despite a shortfall in appropriated funds.

In *New York Airways*, section 406 of the Federal Aviation Act empowered the Civil Aeronautics Board (CAB) to obligate the United States for the payment of an agreed subsidy to helicopter companies for the carrying of passengers, property, and mail, in the absence of any deficiency in congressional appropriations. But by April 1965, the funds for the subsidy element of compensation earmarked by the appropriations Act for fiscal year 1965 were exhausted, and the airline was not paid the balance still due it for that month, 369 F.2d at 744. The wording of section 406 was as follows, *ibid.* at 745:

> The Postmaster General shall make payments *out of appropriations* for the transportation of mail by aircraft of so much of the total compensation as is fixed and determined by the Board under this section without regard to clause (3) of subsection (b) of this section. The Board shall make payments of the remainder of the total compensation payable under this section *out of appropriations made to the Board for that purpose*.

The court found for the airline. It reasoned that the failure of Congress to grant appropriations would not relieve the Government of its contract obligation once the services had been rendered, noting that the Board's duty to fix and determine fair and reasonable rates of compensation was not affirmatively conditioned upon the existence or adequacy of appropriations by Congress to pay the moneys due as the result of the Board's rate-making

power. Relying on the *Ferris* line of cases, the court said, 369 F.2d at 748:

> The case law supports the plaintiff's position as to the effect of section 406(c) of the Act. It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute [distinguishing *Sutton* and *Shipman*].

The court also commented on *Dickerson* and *Gibney, supra*, as follows, *ibid.* at 750:

> The limiting language in the appropriations proviso in the *Dickerson* case would then be, in the words of the *Gibney* opinion, supra, "a legislative provision under the guise of a withholding of funds" which suspended the legal obligation, rather than a simple withholding of funds unaccompanied by other expressed or implied purposes. If the purpose of the limiting language in the appropriation under consideration in the instant case was to suspend or amend section 406(c) of the Federal Aviation Act of 1958, it was not so expressed by statute. Any proof of congressional intention to the contrary in the legislative history must be clear and uncontradicted to lift it from the ruling in the *Gibney* case and place it within the ambit of *Dickerson*.

The court went on to say, *ibid.* at 751-52:

> The actions of the parties support the existence of a contract at least implied in fact. The Board's rate order was, in substance, an offer by

> the Government to pay the plaintiffs a stipulated compensation for the transportation of mail, and the actual transportation of the mail was the plaintiff's acceptance of that offer. No formal contract document was required to support the existence of the contract so implied. The same order established the rate of subsidy to be paid plaintiffs. Thus, from a contractual standpoint, the transportation of mail by the carrier provided the consideration for both the service and subsidy elements of the compensation which became enforceable on performance of the services.

Finally, the court disposed of the Government's contention that the contract with the airline was made invalid by the Anti-Deficiency Act, 31 U.S.C. § 665(a) (1994); now codified at 31 U.S.C. § 1341 (1994), as follows, *ibid.* at 752:

> Since it has been found that the Board's action created a "contract or obligation [which] is authorized by law," obviously the statute has no application to the present situation, unlike the case in *City of Los Angeles v. United States*, 68 F. Supp. 974, 107 Ct. Cl. 315 (1946), where the contract between the plaintiff and the Department of the Interior had no statutory authorization and was thus invalid.

In the case before us, the CSC contracts with the BIA were clearly authorized by law and relied upon by Miccosukee in providing the educational and other services that the BIA would otherwise have had to provide. Therefore, on the basis of *New York Airways*, the Government's obligation to fund these indirect costs in accordance with

the contract remains intact, despite the dollar ceiling in the applicable appropriation act.

As *New York Airways* also illustrates, a formal written contract is not necessary to obligate the Government if the other party performs some act or function for which payment or compensation is promised.

Thus, in *Mayo v. United States*, 319 U.S. 441 (1943), the State of Florida attempted to impose an inspection fee and stamps on commercial fertilizer purchased outside of the State in connection with the Agriculture Department's Soil Conservation program. The soil-building and soil-conserving practices when carried out by a participating farmer entitled him to a grant or benefit payment. To earn this payment, phosphate fertilizers were furnished to him in advance by the Government, and their costs were deducted from the grant, 319 U.S. at 443.

The court said that in promoting soil conservation activities, the United States was acting in a Governmental capacity, and that the distribution of fertilizer directly to farmers was part of that activity. Thus, unless Congress authorized it, a state had no right to regulate the program. The grant was earned as soon as the farmer met the program requirements, *ibid.* at 444-48.

In a similar case, *Aycock-Lindsey v. United States*, 171 F.2d 518 (5th Cir. 1948), the court decided that it had jurisdiction under the Tucker Act, 28 U.S.C. § 1346 (1994), over an action by a naval stores producer to receive subsidy payments under the Soil Conservation Act on the theory that its claim arose under a law of Congress and under an implied contract which it performed and which entitled it to the payment of a subsidy under Department

of Agriculture regulations. The court awarded the subsidy payments.

In *Griffin v. United States*, 215 Ct. Cl. 710 (1978), the plaintiff sued for additional compensation under an Air Force suggestion program when he proposed using periscopes in the Minuteman missile silos, thereby allegedly saving the Government some $45,000,000 but receiving only $8,905 in return, contrary to the formula in the program's regulations. The Government argued that the program was discretionary; but the court said that while the Secretary may originally have had uncontrolled and unreviewable discretion in the matter, once he published procedures and guidelines and implemented them, he surrendered some of his discretion and the legal possibility of abuse of discretion entered the picture. Accordingly, the court remanded the case for trial to determine proper compensation.

Thus, we conclude that even if the basis, form, and content of Indian self-determination contracts and TCSA grants for indirect costs were not expressly prescribed by statute – and probably even if no contract were involved, but entitlement was claimed simply on the basis of the tribe's performance of BIA functions – the Department would be as legally bound by its lawful contracts and agreements, whether written or implied-in-fact, as a private contractor would be under similar circumstances.

3. The Highland Falls and International Union Cases

There are, of course, many different types of Federal grant programs. A large number of them involve gratuitous subsidy programs that provide their payments to public or quasi-public agencies and require no consideration except that the recipient use the funds in the manner intended by the authorizing Act.

Such is not the case here. The Government has had a long-standing affirmative duty under its treaty and trust responsibilities to provide educational and similar assistance to Indian tribes, and the tribes have entered into contracts with the BIA pursuant to statute to carry out these functions on behalf of the BIA. But, again, even ignoring this special relationship of the Federal Government to Indian tribes, the cases cited by the Government in support of an alleged Departmental discretion in the use of OIP funds are not applicable to the facts of this case.

The two cases, besides *Ramah I*, *Adams*, and *Republic*, that the Government thinks ought to be controlling in this case are *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), and *International Union*, *supra*. We will consider *International Union* first.

In *International Union*, the Secretary of Labor was given a $3.7 billion lump-sum appropriation to carry out the Trade Adjustment Assistance (Trade Act) program to provide benefits to workers and companies adversely affected by competition from foreign imports. A subsequent amendment to the Trade Act also authorized, but

did not require, the Secretary to provide training for displaced workers when such training would make the worker employable again. In fiscal year 1982, the Congress provided an additional $25 million for training, job search allowances, and relocation. The Secretary allocated the $25 million for this purpose, but he then allocated the entire original $3.7 billion appropriation for other purposes; and the Union sued him for not making more money available for training and for not reimbursing workers for training costs already incurred. The court found for the Secretary on the ground that a lump-sum appropriation confers discretion on the agency as to its use.

The difference between the Trade Act program and the ISDA and TCSA programs, of course, is that in these latter programs, Congress not only authorized but mandated the payment of indirect costs under specific formulas. As the courts in *Ramah I and II* found, no discretion was involved. The Secretary's duties were only ministerial.

In *Highland Falls*, the Department of Education (DOE) was required to allocate funds for various entitlements under the Impact Aid Act to school districts that had lost revenues because of nontaxable local properties owned by the Federal Government. Although the method of allocation was mandatory, the entitlement to funds under the Act was not, 48 F.3d at 1167. Thus, when DOE initially received lump-sum appropriations for the purposes of the Act, it followed the priorities in the original statute.

However, in fiscal years 1989-93, Congress not only did not appropriate enough money to fully fund these

lost-revenue entitlements, but specifically earmarked the amounts of money to be spent on *each* of the various sections of the Act; and the Department then followed these specifications, even though the priorities in the appropriation Acts differed from the priorities in the authorizing Act. The plaintiff argued that money should be taken from other earmarked funds to carry out the priorities in the original Act, but the court held that DOE's method of allocation harmonized the requirements of the Act and of the appropriations statutes and was therefore proper.

As the Appellants note, the *Highland* court read the shortfall allocation provision in the Act, which gave priority to payments for lost revenues, to apply only when Congress enacted a lump-sum appropriation. But when the enacted appropriation, as in that case, provided *only* earmarked funds, then the court concluded that those earmarks, as well as the shortfall provisions of the Impact Aid Act, would control, in accordance with the anti-transfer and anti-deficiency Acts. Therefore, the court held, the school district did not have a valid claim against the Government for any additional funds.

Because the ISDA, like the legislation in *New York Airways*, *Healy*, and *Blackhawk*, contains no such shortfall provision, *see Ramah I*, 87 F.3d at 1348, there would be no way to reconcile its mandatory indirect cost funding provisions with an inadequate appropriation *except* by finding a repeal by implication of these provisions of the authorizing Act, which – as we have seen – did not occur.

The very fact that Miccosukee's CSC contract restated the cautionary language that it was subject to the availability of appropriations clearly illustrates why the courts over the years have refused to place the full burden of general appropriations shortfalls and subsequent earmark limitations on the private parties who deal with, and justifiably rely on, the Government to do what, pursuant to an authorizing Act, it has said it will do. Otherwise, the Government's contractual promises would become a mere sham.

Miccosukee's contract was entered into, pursuant to deliberate and specific statutory mandate, many months before the relevant appropriations Act was passed. There was no way the Miccosukee or, indeed, anyone, could have foreseen either the provisions or the amount that the final appropriations Act would prescribe. Meanwhile, the tribe was engaged in performing the BIA's traditional functions in good faith and in reliance on its OIG contract, precisely as the ISDA intended.

To reiterate what the *Shipman* court said, "where there is liability on the part of the Government, it is not avoided by the omission on the part of Congress to provide the money with which to discharge it." *Accord, Gibney,* 114 Ct. Cl. 38: "We know of *no case* in which *any* of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend a statutory obligation," (emphasis added).

Of course, if Congress after enacting the ISDA had refused to appropriate *any* funds for it, that might have been a different story. *See, e.g.,* the two *New York Central* cases, 21 Ct. Cl. at 470 and 65 Ct. Cl. at 128, and *Seatrain,*

99 Ct. Cl. at 315, cited above. But that did not happen here. Therefore, under the ISDA, Miccosukee is legally entitled to the full funding of its CSC contract, based on the tribe's actual performance in reliance on it. *Ramah II*, 112 F.3d at 1463.

V. CONCLUSION AND DECISION

A. Conclusion

Unlike the situation in *American Telephone, supra*, there was nothing illegal about the self-determination contracts that Alamo and Miccosukee entered into with the BIA under the TCSA and the ISDA for these tribal organizations to carry out the BIA's functions. In that respect, both the tribes and the BIA did exactly what Congress directed them to do. The problem arose when subsequent appropriations Acts did not sufficiently fund those commitments and when the BIA, as in *Ramah I*, decided it knew best how to apportion the reduced appropriation.

In some sense, therefore, the issue in this case is not so much whether the BIA should keep faith with Congress but, rather, whether Congress should keep faith with the Indians in funding the ISDA and TCSA, thereby honoring the treaties and promises that it and the executive branch have made to the tribes over the last century and a half. Here, however, as we have seen, the question is more or less academic because the law appears to be on the side of the Indians, independent of the Government's trust responsibilities.

The Board is not unaware of the difficulties that this appeal may create for the BIA in either following our decision or attempting to overturn it in the courts. But as the Court of Claims said in *Geddes, supra*: "The judgment of a court has nothing to do with the means – with the remedy for satisfying a judgment. It is the business of the courts to render judgments, leaving to Congress and the executive officers the duty of satisfying them," 38 Ct. Cl. at 444. And, finally, as the Supreme Court said in *TVA v. Hill*, 437 U.S. at 194-95:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power to veto.

B. Decision

1. Accordingly, we grant the Appellant's motion for summary judgment and hold that

a) Alamo is entitled to full ACG funding for school years 1990-91 through 1993-94, based on the percentages derived from the statutory formula and the total amount of the direct program base funding for each fiscal year.

b) The direct program base for the above purpose shall include *all* appropriate direct funding provided to Appellants each year.

c) Miccosukee is entitled to full indirect cost funding in fiscal year 1994, using the percentages derived from the statutory formula for ACG's and from the agreements entered into with the OIG for CSC's.

2. The Government's motions for summary judgment are denied.

3. These appeals are hereby remanded to the parties to negotiate the amounts of increased funds required in accordance with this decision.

/s/ Bernard V. Parrette
Bernard V. Parrette
Administrative Judge

I concur:

/s/ Gene Perry Bond
Gene Perry Bond
Chief Administrative Judge

APPENDIX C

IN REPLY REFER TO

[Seal] United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF CONTRACT APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

APPEAL OF OGLALA SIOUX TRIBAL
PUBLIC SAFETY DEPARTMENT

IBCA 3680-97	Decided June 24, 1998
Contract No. CTA 06X 32002 Bureau of Indian Affairs	: Appellant's Motion for : Summary Judgment : Granted
APPEARANCE FOR APPELLANT:	Michael P. Gross, Esq. Attorney at Law Santa Fe, New Mexico
APPEARANCE FOR GOVERNMENT:	Thomas C. Jacobs, Esq. Department Counsel Ft. Snelling, Minnesota

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

This appeal was received by the Board and docketed on January 6, 1997. Appellant's Complaint was received on April 21, and the Government's Answer on May 19. The Board orally stayed the proceeding on May 21, pursuant to a motion filed by Appellant's former counsel, averring that the outcome of this appeal would likely be affected by the Board's decision in *Alamo/Miccosukee*, IBCA 3463, 3560, *et al.*, which later found the Government (Bureau of Indian Affairs (BIA)) liable for full funding of

the two Tribes' indirect costs as provided in their executed contracts with BIA. The decision in those appeals was issued on December 4, 1997 (1997 WL 759441), and reaffirmed by the Board on March 2, 1998, 98-2 BCA ____.

On March 26, 1998, the Board *sua sponte* issued an Order proposing a further stay of proceedings until the *Alamo/Miccosukee* decision either was appealed or became final. Department counsel concurred; but Appellant's new counsel, identified above, filing under the redesignation of Appellant's name also set forth above, objected to further delay on the ground that summary judgment should be immediately granted to Appellant because the legal issues in the two cases are essentially the same and because Appellant might want to participate as a party in the *Alamo/Miccosukee* appeal, in the event that it prevails here and the Government also appeals this decision.

On June 2, the Board issued to the Government an Order to Show Cause why immediate summary judgment should not be granted to Appellant. The Government responded on June 11, 1998, asserting that good cause existed for the Board not to issue summary judgment and asking that the case be stayed until a final, unappealable decision could be issued in *Alamo/Miccosukee*, which the Government said it intended to appeal to the Federal Circuit.

Appellant replied on June 17, submitting an affidavit from the Tribal Department's accountant setting forth the amounts of indirect costs the Department had received in contrast to its entitlement, alleging reliance on the latter amount and a resulting shortfall in the amount of

$108,506, the same amount set forth in Appellant's Complaint. However, since, as in *Alamo/Miccosukee*, the principal issue before us pertains only to the entitlement, we will once more limit our decision to that issue.

The essence of the Government's opposition to summary judgment is that because the appeal in this case involves a different fiscal year (1995) and a different Congressional Committee Report from that in *Alamo/Miccosukee*, the cases are also different, and that summary judgment based on *Alamo/Miccosukee* is not appropriate. We conclude, however, that these differences are insufficient to raise genuine issues of material fact.

The Government also raises objections similar to those raised in its previous motion for reconsideration of the decision in *Alamo/Miccosukee;* namely, that in *Alamo/Miccosukee* the Board "fundamentally misunderstood the nature of '638' contracts [i.e., Indian Self-Determination contacts] between BIA and the Tribes" because "these contracts are not like other government procurement, where bids are made and accepted." It should be noted that (a) this allegation is immaterial to whether the case before us is essentially the same legally as *Alamo/Miccosukee* and, in any event, (b) the Board made no assertion nor implication in its *Alamo/Miccosukee* decision that 638 contracts are procurement contracts noting, in fact, that the Indian Self-Determination Act clearly says otherwise (25 U.S.C. § 450b(j) (1994)). The Government acknowledges that the Board has previously disposed of this disparity of contracts argument.

The Government nevertheless asserts that the case before us differs from *Alamo/Miccosukee* because the

Board in that case rejected the appellate court's decision in *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) as a binding precedent partly on the ground that *Ramah* involved a different fiscal year's appropriations than *Alamo/Miccosukee*. While it is true that *Alamo/Miccosukee* mentioned the different fiscal year as a difference, a careful reading of that decision would make clear that our principal reason for not relying on *Ramah* was that the court in that case had before it an entirely different issue; namely, whether the Secretary could penalize a Tribe for not complying with the Secretary's administrative directives by cutting its indirect cost payment in half. The *Ramah* court said that the Secretary clearly lacked authority to change the statutory formula.

So, too, the Board in *Alamo/Miccosukee* concluded that the Secretary lacked authority to breach the statutory indirect cost contracts previously entered into with the Tribes, under which the Tribes had already satisfactorily performed, simply on the basis of a reduced lump sum appropriation – regardless of Congressional Committee Report language – because the Department was legally bound by these indirect cost contracts, to which the authorizing statute clearly gave funding priority and concerning which there was no discretion – unless and until the Congress enacted new legislation. We said that Committee Report language was insufficient to modify this clear statutory mandate.

As Appellant points out, the *legal* issues in the case now before the Board are essentially the same as those that were before us in *Alamo/Miccosukee*. We therefore conclude that the minor differences in the two cases,

involving the applicable fiscal year and applicable Committee Report language are immaterial.

Decision

Accordingly, Appellant in this case is entitled to immediate summary judgment for the reasons set forth in *Alamo/Miccosukee*. It is so ordered.

/s/ Bernard V. Parrette
Bernard V. Parrette
Administrative Judge

I concur:

/s/ Gene Perry Bond
Gene Perry Bond
Chief Administrative Judge

APPENDIX D

RELEVANT STATUTES

25 U.S.C.

SUBCHAPTER II – INDIAN SELF-DETERMINATION

§ 450. Congressional statement of findings

(a) The Congress, after careful review of the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that –

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that –

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not

effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

---

§ 450a. Congressional declaration of policy

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of

administering quality programs and developing the economies of their respective communities.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self- determination essential to their social and economic well-being.

---

§ 450f. Self-determination contracts

(a) Request by tribe; authorized programs

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs –

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C.A. § 452 et seq.];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C.A. § 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C.A. § 2001 et seq.];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

* * *

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§ 450j-1. Contract funding and indirect costs

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to

this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supporting administrative functions that are otherwise contrastable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which –

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of –

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation

of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall; –

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 13a of this title.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary –

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be repaid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) Reductions and increases in amount of fund provided

The amount of funds required by subsection (a) of this section –

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to –

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this subchapter or as provided in section 450j(c) of this title.

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

(c) Annual report

The Secretary shall provide an annual report in writing on or before May 15 of each year to the Congress on the implementation of this subchapter. Such report shall include –

(1) an accounting of the total amounts of funds provided for each program and budget activity for direct program costs and contract support costs of

tribal organizations under self-determination contracts during the previous fiscal year;

(2) an accounting of any deficiency of funds needed to provide required contract support costs to all contractors for the current fiscal year;

(3) the indirect costs rate and type of rate for each tribal organization negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pools; and

(6) an accounting of any deficiently of funds needed to maintain the preexisting level of services to any tribes affected by contracting activities under this subchapter, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle to a different accounting cycle, as authorized by section 450j(d) of this title.

(d) Treatment of shortfalls in indirect cost recoveries

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such

tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

(e) Liability for indebtedness incurred before fiscal year 1992

Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A-87, incurred for fiscal years prior to fiscal year 1992.

(f) Limitation on remedies relating to cost disallowances

Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force prior to enactment of chapter 75 of Title 31, any other required final audit report. Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to section 450m-l of this title. For the purpose of determining the 365-day period specified in this paragraph, an audit report shall

be deemed to have been received on the date of actual receipt by the Secretary, if, within 60 days after receiving the report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency report as insufficient due to noncompliance with chapter 75 of Title 31, or noncompliance with any other applicable law. Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to section 476 of this title.

(g) Addition to contract of full amount contractor entitled; adjustment

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

* * *

(j) Use of funds for matching or cost participation requirements

Notwithstanding any other provision of law, a tribal organization may use funds provided under a self-determination contract to meet matching or cost participation requirements under other Federal and non-Federal programs.

(k) Allowable uses of funds without approval of Secretary

Without intending any limitation, a tribal organization may, without the approval of the Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:

(1) Depreciation and use allowances not otherwise specifically prohibited by law, including the depreciation of facilities owned by the tribe or tribal organization.

(2) Publication and printing costs.

(3) Building, realty, and facilities costs, including rental costs or mortgage expenses.

(4) Automated data processing and similar equipment or services.

(5) Costs for capital assets and repairs.

(6) Management studies.

(7) Professional services, other than services provided in connection with judicial proceedings by or against the United States.

(8) Insurance and indemnification, including insurance covering the risk of loss of or damage to property used in connection with the contract without regard to the ownership of such property.

(9) Costs incurred to raise funds or contributions from non-Federal sources for the purpose of furthering the goals and objectives of the self-determination contract.

(10) Interest expenses paid on capital expenditures such as buildings, building renovation,

or acquisition or fabrication of capital equipment, and interest expenses on loans necessitated due to delays by the Secretary in providing funds under a contract.

(11) Expenses of a governing body of a tribal organization that are attributable to the management or operation of programs under this subchapter.

(12) Costs associated with the management of pension funds, self-insurance funds, and other funds of the tribal organization that provide for participation by the Federal Government.

(l) Suspension, withholding, or delay in payment of funds

(1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the

burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

(m) Use of program income earned

The program income earned by a tribal organization in the course of carrying out a self-determination contract –

(1) shall be used by the tribal organization to further the general purposes of the contract; and

(2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

(n) Reduction of administrative and other responsibilities of Secretary; use of savings

To the extent that programs, functions, services, or activities carried out by tribal organizations pursuant to contracts entered into under this subchapter reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and resulting savings that have not otherwise been included in the amount of contract funds determined under subsection (a) of this section, the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(o) Rebudgeting by tribal organization

Notwithstanding any other provision of law (including any regulation), a tribal organization that carries out a self-determination contract may, with respect to allocations within the approved budget of the contract, rebudget to meet contract requirements, if such rebudgeting would not have an adverse effect on the performance of the contract.

---

§ 450*l*

* * *

(c) Model agreement

* * *

(4) Funding amount. – Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

* * *

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§ 450m-1. Contract disputes and claims

(s) Civil actions; concurrent jurisdiction; relief

The United States district court shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

(b) Revision of contracts

The Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent.

* * *

(d) Application of Contract Disputes Act

The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

* * *

APPENDIX E

Public Law 103-332

BUREAU OF INDIAN AFFAIRS
OPERATION OF INDIAN PROGRAMS

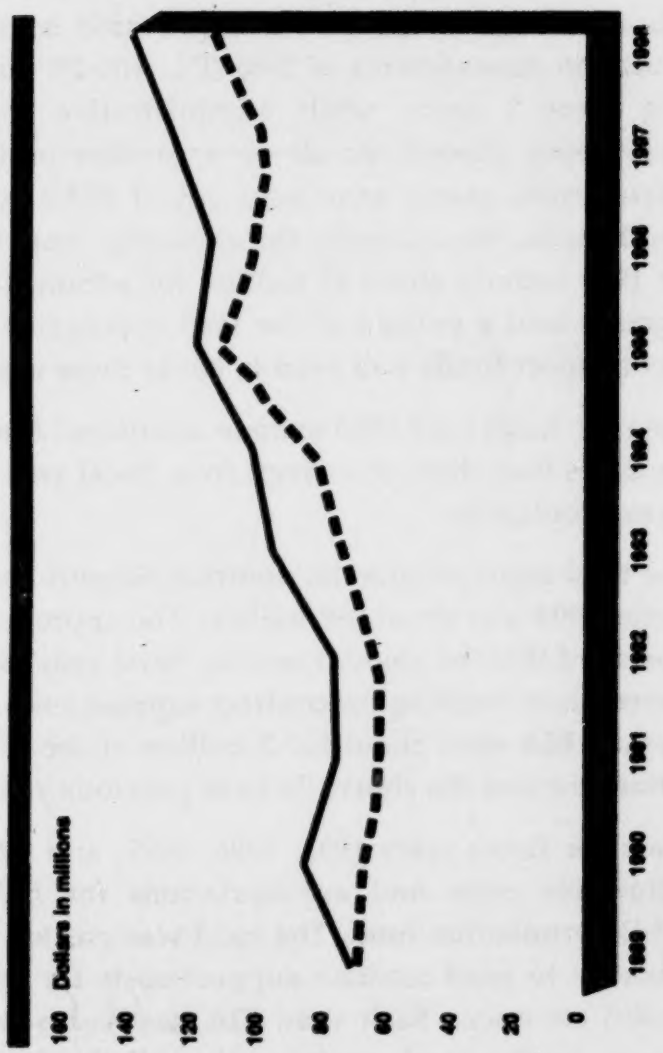
For operation of Indian programs by direct expenditure, contracts, cooperative agreements, and grants including expenses necessary to provide education and welfare services for Indians, either directly or in cooperation with States and other organizations, including payment of care, tuition, assistance, and other expenses of Indians in boarding homes, or institutions, or schools; grants and other assistance to needy Indians; maintenance of law and order; management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau of Indian Affairs, including payment of irrigation assessments and charges; acquisition of water rights; advances for Indian industrial and business enterprises; operation of Indian arts and crafts shops and museums; development of Indian arts and crafts, as authorized by law; for the general administration of the Bureau of Indian Affairs, including such expenses in field offices; maintaining of Indian reservation roads as defined in section 101 of title 23, United States Code; and construction, repair, and improvement of Indian housing, $1,526,778,000. . . . and of which not to exceed $95,823,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975, as amended: Provided, That tribes and tribal contractors may use their tribal

priority allocations for unmet contract support costs of ongoing contracts, grants or compact agreements. . . .

APPENDIX F

Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Needs To Be Addressed, U.S. General Accounting Office (June 1999) No. B-282458, GAO Report

Figure 2.5: BIA's Shortfalls in Contract Support Costs, Fiscal Years 1989 Through 1998


160 Dollars in millions
140
120
100
80
60
40
20
0
1988 1990 1991 1992 1993 1994 1995 1996 1997 1998
Fiscal year
Contract support costs
Appropriations

Note 1: Funds are in constant 1998 dollars.

Note 2: Data for fiscal years 1989, 1990, and 1991 include allowable costs and appropriations for administrative cost grants for education programs as provided by the Indian Education Amendments of 1988 (P.L. 100-297, title V). During these 3 years, while administrative costs grants were being phased in, all or a portion of the administrative costs grants were paid out of BIA's contract support funds. For example, the allowable costs for fiscal year 1989 include about $7 million for administrative cost grants, and a portion of the 1989 appropriation for contract support funds was used to cover those costs.

Note 3: Data for fiscal year 1990 include additional funding for the tribes that chose to convert from fiscal year to calendar year contracts.

Note 4: The total appropriation for contract support costs for fiscal year 1994 was about $98 million. The appropriation bill specified that the amount was for fiscal year 1994 and the shortfalls in funding for contract support costs in previous years. BIA used about $17.5 million of the 1994 appropriation to cover the shortfalls from previous years.

Note 5: Data for fiscal years 1995, 1996, 1997, and 1998 contain allowable costs and appropriations for BIA's Indian Self-Determination fund. The fund was created in 1995 exclusively to fund contract support costs for new and expanded contracts. Each year, BIA has had a carryover balance in the fund, meaning that all the funds appropriated were not spent each year, and some amount was carried over to the next fiscal year. The amounts included in the figure as the contract support costs and the appropriations are the amounts actually expended

each year. At the end of fiscal year 1998, the available carryover balance in the Indian Self-Determination fund was $1.88 million.

Source: GAO's analysis of BIA's data.

APPENDIX G

Report: "A Study of Contract Support Costs in The Bureau of Indian Affairs and Recommendations for Reform," BIA Work Group on Contract Support Costs No. 5, June 1999

The 10-year history of the Bureau's contract support appropriations and distribution shows the following:

Figure 4.8 ($ in 000's)

(Col.1) Fiscal Year	(Col.2) CSF Need	(Col. 3) Budget Request	(Col. 4) Enacted	(Col. 5) % Funded	(Col. 6) Shortfall (Col.2-4)	(Col. 7) % Shortfall
1990	69,364	49,386	56,386	81%	12,978	19%
1991	64,034	44,386	53,107	83%	10,927	17%
1992	66,320	57,440	53,107	80%	13,213	20%
1993	85,189	57,703	65,223	77%	19,966	23%
1994	92,981	83,808	84,808	91%	8,173	9%
1995	103,945	95,823	95,640	92%	8,305	8%
1996	104,526	109,626	90,829	87%	13,697	13%
1997	117,346	110,608	90,829	77%	26,517	23%
1998	131,714	105,829	105,829	80%	25,885	20%
1999	138,914*	114,917	114,891	83%*	24,023*	17%*
2000	144,624*	121,338	121,338*	84%*	23,286*	16%*

Source: BIA, 1999. Notes: The above data is subject to revision. It was difficult to ascertain the true amounts because of changing data in reported contract support needs, which result in changes in distribution tables.

Supreme Court, U.S.
FILED
APR 26 2001
CLERK

Nos. 99-1239 and 99-1261

In the Supreme Court of the United States

OGLALA SIOUX TRIBAL PUBLIC SAFETY DEPARTMENT, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR

MICCOSUKEE CORPORATION, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Miccosukee Corporation and the Oglala Sioux Tribal Public Safety Department, both tribal organizations, were entitled to full funding of the contract support costs associated with their provision of services to their respective Tribes, where the statutory and contractual provisions relating to payment of those costs make payment subject to the availability of appropriations, and where Congress specifically capped appropriations for contract support costs at a level insufficient to provide full funding.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, 516 U.S. 137 (1995)	10
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992)	8
Heckler v. *Community Health Servs.*, 467 U.S. 51 (1984)	16
Moskal v. *United States*, 498 U.S. 103 (1990)	11
New York Airways, Inc. v. *United States*, 369 F.2d 743 (Ct. Cl. 1966)	7, 14
OPM v. *Richmond*, 496 U.S. 414 (1990)	7, 17
Ramah Navajo Chapter v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997)	7, 13
Ramah Navajo Sch. Bd., Inc. v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996)	3, 7, 9, 12, 13
Rubin v. *United States*, 449 U.S. 424 (1981)	8
South Carolina v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986)	16
United States v. *Ron Pair Enters.*, 489 U.S. 235 (1989)	15
United States v. *Winstar Corp.*, 518 U.S. 839 (1996)	15
Varity Corp. v. *Howe*, 516 U.S. 489 (1996)	11
West Virginia Univ. Hosps., Inc. v. *Casey*, 499 U.S. 83 (1991)	16

Case—Continued: Page

Yankee Atomic Elec. Co. v. *United States*, 112 F.3d 1569 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998) 15

Constitution and statutes:

U.S. Const. Art. I, § 9, Cl. 7 (Appropriations Clause) 10

Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*:

25 U.S.C. 450-450n (1994 & Supp. IV 1998) 2, 8
25 U.S.C. 450a(b) 2
25 U.S.C. 450f 3
25 U.S.C. 450j(c) 9
25 U.S.C. 450j(c)(2) 9, 11
25 U.S.C. 450j-1 ..... 10, 11, 12
25 U.S.C. 450j-1(a) 8, 9, 10, 11
25 U.S.C. 450j-1(a)(1) 3
25 U.S.C. 450j-1(a)(2) 3
25 U.S.C. 450j-1(b) ..... *passim*
25 U.S.C. 450*l*(a) 3, 11
25 U.S.C. 450*l*(c) 3, 4, 9, 11, 14, 15

Interior Appropriations Act of 1994, Pub. L. No. 103-138, Tit. I, 107 Stat. 1379 4
107 Stat. 1391 4

Interior Appropriations Act of 1995, Pub. L. No. 103-332, 108 Stat. 2511 5

Miscellaneous:

58 Fed. Reg. 68,694 (1993) 5
59 Fed. Reg. 55,318 (1994) 5

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 99-1239, *Oglala Sioux Tribal Public Safety Department* v. *Babbitt* (*Oglala Sioux*) (Oglala Pet. App. A1-A21),[1] is

[1] The petition for a writ of certiorari in No. 99-1239, *Oglala Sioux Tribal Public Safety Department* v. *Babbitt*, is referenced herein as "Oglala Pet.," and the Appendix to that petition as "Oglala Pet. App." The petition in No. 99-1261, *Miccosukee Corporation* v. *Babbitt*, is referenced as "Miccosukee Pet.," and the Appendix to that petition as "Miccosukee Pet. App."

reported at 194 F.3d 1374. The decision of the United States Department of the Interior Board of Contract Appeals (Oglala Pet. App. B78-B82) is reported at IBCA No. 3680-97, 98-2 BCA (CCH) ¶ 29,833, *available in* 1998 WL 347090 (June 24, 1998).

The opinion of the court of appeals in No. 99-1261, *Miccosukee Corp.* v. *Babbitt* (*Miccosukee*) (Miccosukee Pet. App. 1a-2a) is unreported. The decision of the IBCA (Miccosukee Pet. App. 22a-74a) is reported at IBCA Nos. 3463-3466 & 3560-3562, 98-2 BCA (CCH) ¶ 29,832 (Mar. 2, 1998).

JURISDICTION

The judgment of the court of appeals in *Oglala Sioux* was entered on October 27, 1999, and the petition for a writ of certiorari was filed on January 24, 2000. The judgment of the court of appeals in *Miccosukee* was entered on October 29, 1999, and the petition for a writ of certiorari was filed on January 27, 2000. This Court's jurisdiction is invoked in both cases under 28 U.S.C. 1254(1).

STATEMENT

1. The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n (1994 & Supp. IV 1998), was enacted in 1975 to permit Indian Tribes to contract with the Secretary of the Interior (the Secretary) to administer programs that otherwise would be controlled and operated by the Secretary. The ISDA was intended to ensure "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal services and programs provided to the Tribes and their members. 25 U.S.C. 450a(b). To advance that purpose, the ISDA provides that, at the request of a Tribe, a Tribe and the Secretary may enter into a "self-

determination contract" under which the Tribe or a tribal entity takes over the administration of certain federal programs for the Tribe. 25 U.S.C. 450f. See *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir. 1996) ("The ISDA directs the Secretary * * * to turn over to that Tribe the direct operation of its federal Indian Programs."). Self-determination contracts must incorporate the provisions of a model contract contained in the ISDA itself. See 25 U.S.C. 450*l*(a) and (c).

The ISDA requires the Secretary to fund direct and indirect costs in support of self-determination contracts. Direct costs are those amounts the "Secretary would have otherwise provided for the operation of the programs" if the Secretary himself had retained operation of the programs. 25 U.S.C. 450j-1(a)(1). Indirect costs, or contract support costs (CSCs), "consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor." 25 U.S.C. 450j-1(a)(2).[2] The provision of funds to cover direct and indirect costs, however, is limited by a succeeding provision of the ISDA, Section 450j-1(b), which is entitled "Reductions and increases in amount of funds provided." Section 450j-1(b) declares that, "[n]otwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations." 25 U.S.C. 450j-1(b). Section 450*l*(c) incorporates that same limit

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[2] The indirect cost rate is a percentage determined by annual negotiations between the contracting party and the Department of the Interior's Office of the Inspector General. The amount of reimbursement for indirect costs is calculated by multiplying the indirect cost rate by the total direct costs of the contracting party for the relevant fiscal year.

into the model contract, declaring that the Secretary shall "make available to the Contractor the total amount specified in" its contract, "[s]ubject to the availability of appropriations." 25 U.S.C. 450*l*(c).

2. This case arises out of self-determination contracts the Secretary entered into with the Miccosukee Corporation (Miccosukee), a tribal corporation controlled by the Miccosukee Tribe of Indians of Florida, and with the Oglala Sioux Tribal Public Safety Department (Oglala), a tribal organization that handles public safety for the Oglala Sioux Tribe in South Dakota.

a. Miccosukee operated 12 self-determination contracts for services administered on behalf of the Miccosukee Tribe in the 1994 fiscal year. Miccosukee Pet. App. 26a. The "Indirect Cost Negotiated Agreement" signed by the Miccosukee Corporation in September of 1993, under the heading "LIMITATIONS," declared that "[u]se of the rates contained in this agreement is subject to any applicable statutory limitations." Miccosukee C.A. App. 69.

The Interior Appropriations Act of 1994, Pub. L. No. 103-138, Tit. I, 107 Stat. 1379, which governed funding of ISDA contracts for the 1994 fiscal year, capped funding of CSCs at slightly over $91 million, a level inadequate to fully fund all CSCs. Miccosukee Pet. App. 26a. In relevant part, the Interior Appropriations Act of 1994 stated as follows:

> *Provided Further*, That not to exceed $91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts authorized by the Indian Self Determination Act of 1975 * * *.

107 Stat. 1391.

Soon after that appropriations Act was passed, the Bureau of Indian Affairs (BIA), an arm of the Department of the Interior, published a notice in the Federal Register informing ISDA contractors that Congress had limited the amount of funding for CSCs, and that a shortfall of as much as $25 million was expected. See 58 Fed. Reg. 68,694 (1993). The Federal Register notice also explained how available funds would be distributed. *Ibid.*

Once the BIA determined the precise amount of the shortfall in June of 1994, it informed tribal contractors (including Miccosukee) that it would be able to fund only 81.2106% of each contractor's CSCs for the 1994 fiscal year. Miccosukee Pet. App. 27a. Miccosukee requested a contracting officer's decision to fully fund all of its CSCs notwithstanding the notice, and the contracting officer denied Miccosukee's claim. *Id.* at 28a.

b. Oglala operated a self-determination contract during the 1995 fiscal year. Its indirect cost agreement, like Miccosukee's, stated that use of the negotiated rates would be "subject to" applicable statutory limits. Oglala C.A. App. 20. For the 1995 fiscal year, Congress capped the appropriation for CSC payments at just under $96 million. See Interior Appropriations Act of 1995, Pub. L. No. 103-332, 108 Stat. 2511. Because that sum was insufficient to cover total CSC costs, the Secretary again published a notice in the Federal Register explaining how the Secretary planned to allocate available funds to pay indirect costs. See 59 Fed. Reg. 55,318 (1994). Ultimately, for the 1995 fiscal year, the Secretary was able to pay 91.74% of CSCs. In Oglala's case, that left $108,506 in CSCs unpaid for that year. Oglala sought full funding of its CSCs from the

contracting officer, and the officer denied Oglala's claim. Oglala Pet. 4.

3. Both Miccosukee and Oglala appealed to the Interior Board of Contract Appeals (IBCA or Board). The IBCA stayed Oglala's claim pending resolution of Miccosukee's. On cross-motions for summary judgment on liability, the IBCA granted Miccosukee's motion, finding that the ISDA entitled Miccosukee to full funding of all CSCs. Miccosukee Pet. App. 22a-72a. The IBCA then ordered the Secretary to show cause why summary judgment should not be granted to Oglala. After the Secretary submitted his argument, the IBCA granted summary judgment to Oglala for the reasons stated in its *Miccosukee* opinion. Oglala Pet. App. C78-C82.

4. The Secretary appealed both decisions. On October 27, 1999, the Court of Appeals for the Federal Circuit reversed the IBCA's decision in *Oglala*. Oglala Pet. App. A1-A21. The court of appeals explained that, under 25 U.S.C. 450j-1(b), any funds provided under an ISDA contract are subject to the availability of appropriations. Oglala Pet. App. A6 ("The language of § 450j-1(b) is clear and unambiguous; any funds provided under an ISDA contract are 'subject to the availability of appropriations.'"). That straightforward reading of the ISDA, the court explained, is consistent with other provisions of the Act. *Id.* at A6-A7. Moreover, the court continued, the Court of Appeals for the District of Columbia Circuit had construed the ISDA in an identical manner. See *id.* at A10 ("[T]he D.C. Circuit found the language of § 450j-1(b) as clear as we do.") (citing

Ramah Navajo Sch. Bd., Inc. v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996)).[3]

The court of appeals rejected Oglala's reliance on *New York Airways, Inc.* v. *United States*, 369 F.2d 743 (Ct. Cl. 1966). See Oglala Pet. App. A9-A10. In that case, the court of appeals explained, the government had failed to meet an unqualified payment obligation imposed by the contract. *Id.* at A10. Here, in contrast, the payment obligation was not unqualified. To the contrary, both the ISDA and the contract itself made payment contingent on the availability of appropriated funds. *Ibid.*

Finally, the court of appeals found that Oglala could not have reasonably relied on the expectation that it would receive full funding for CSCs in light of the "subject-to-availability-of-appropriations" language in the ISDA and the model contract. Oglala Pet. App. A12. In any event, the court of appeals continued, neither naked reliance nor estoppel can by itself obligate the federal government to pay money from the Treasury absent an appropriation by Congress *Ibid.* (citing *OPM* v. *Richmond*, 496 U.S. 414, 423-424 (1990)).

On October 29, 1999, the court of appeals reversed the IBCA's decision in *Miccosukee* for the reasons stated in the court's October 27, 1999 opinion in *Oglala*. Miccosukee Pet. App. 1a-2a. Because the court of appeals decided the *Miccosukee* case and the *Oglala* case on identical grounds, and because Miccosukee's

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[3] The court of appeals also distinguished *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997). That decision, the court explained, did not deal with a shortfall caused by Congress's failure to appropriate funds and thus has no bearing on the meaning of Section 450j-1(b) or the result in this case. Oglala Pet. App. A11.

and Oglala's petitions rely on arguments that are substantially similar, we submit this consolidated opposition to both petitions for writs of certiorari.

ARGUMENT

Both petitioners contend that the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n (1994 & Supp. IV 1998), requires full funding and payment of their contract support costs, notwithstanding Congress's decision not to appropriate sufficient funds to cover the full amount of those costs. The court of appeals, however, correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The provision of the ISDA governing contract funding and indirect costs, 25 U.S.C. 450j-1(a) and (b), is clear and unambiguous. Section 450j-1(b) states that, "[n]otwithstanding any other provision" of the ISDA regarding contract funding and direct costs, "the provision of funds under this subchapter is subject to the availability of appropriations." 25 U.S.C. 450j-1(b). In reading that provision to bar payment where Congress declines to appropriate funds, the court of appeals properly applied the elementary axiom that "[w]hen the words of a statute are unambiguous, then * * * 'judicial inquiry is complete.'" *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)).

The court of appeals' construction is also consistent with the structure of the ISDA as a whole. Section 450j-1(a), which is entitled "Amount of funds provided," establishes the amounts that must be provided to tribal organizations under ISDA contracts. Because Section 450j-1(b) is entitled "Reductions and increases in

amount of funds provided," and because it immediately follows Section 450j-1(a), it is most logically read as providing the conditions under which the Secretary may pay less (or more) than the amount otherwise provided by Section 450j-1(a).

Indeed, any ambiguity on that score is removed by 25 U.S.C. 450j(c) and 450*l*(c). Section 450j(c) establishes the duration of self-determination contracts, and it declares that "[t]he amounts of such contracts *shall be subject to the availability of appropriations.*" 25 U.S.C. 450j(c) (emphasis added). That the phrase "amounts of such contracts" in Section 450j(c) means the amounts payable under the contracts is made clear by 450j(c)(2), which declares that the "amounts of such contracts may be renegotiated annually to reflect change[s]" such as "cost increases beyond the control of the tribal organization." Section 450*l*(c), which establishes the terms of the model contract, similarly states that "the Secretary shall make available to the Contractor the total amount specified in the" ISDA contract, "[s]ubject to the availability of appropriations." 25 U.S.C. 450*l*(c).

Finally, the court of appeals' reading is consistent with the over-all function of the ISDA. The ISDA in effect permits the Secretary and Indian Tribes, by agreement, to substitute tribal organizations for the Department of the Interior in the administration and provision of various federal programs and services to Indian Tribes. See *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir. 1996) ("The ISDA directs the Secretary * * * to turn over to that Tribe the direct operation of its federal Indian Programs."). In so doing, the ISDA places the Tribe in many respects in the same position the Secretary would occupy, and subjects the Tribe to the same limits the Secretary would be subject to, if the Secretary continued to

operate the particular program himself. For example, the Secretary is required to pay the Tribes the amount the Secretary would have expended in providing those services himself. 25 U.S.C. 450j-1(a). Consistent with that general purpose of substituting tribal organizations for federal bureaucracy, Section 450j-1(b) also imposes on ISDA funding a limit that likewise applies to funding of programs directly administered by the Secretary. In the context of programs administered by the Secretary, the established rule, mandated by the Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7, is that, where Congress refuses to appropriate funds for the programs, funds are unavailable and may not be spent on the programs. Section 450j-1(b) merely applies that same rule to the same programs where tribal organizations have taken over administration from the Secretary.

2. Petitioners nonetheless argue (Oglala Pet. 9-12; Miccosukee Pet. 14-17) that the court of appeals misinterpreted the text of Section 450j-1. In particular, they argue that Section 450j-1(a) mandates full funding of CSCs. Section 450j-1(b), they contend, only clarifies that the Secretary need not *disburse* funds that have not been appropriated. In essence, they argue that Section 450j-1(b), which states that "the *provision* of funds under [the ISDA] is subject to the availability of appropriations," 25 U.S.C. 450j-1(b) (emphasis added), should be read as declaring that "the *distribution* of funds under the [ISDA] is subject to the availability of appropriations." Miccosukee Pet. 19 (emphasis added).

Petitioners' reading asks this Court to depart from the rule that a word in a statute ordinarily must "be given its ordinary or natural meaning," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995), and ignores the plain import of Section 450j-1(b), which on its face

places limitations on the payments to Tribes authorized by Section 450j-1(a). See *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996) (noting that the canon that "the specific governs the general" is "a warning against applying a general provision when doing so would undermine limitations created by a more specific provision"). Moreover, as petitioners concede (*e.g.*, Miccosukee Pet. 20), the Secretary would be barred from paying out funds on a program in excess of the amount appropriated therefor even if Section 450j-1(b) did not itself so provide. By interpreting Section 450j-1(b) as doing no more than to restate that legal rule, petitioners convert it into surplusage in contravention of a fundamental canon of statutory construction. See *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990).[4]

Finally, to the extent petitioners claim that Section 450j-1 distinguishes between the Secretary's authority to *enter into contracts* to obligate funds, and the Secretary's authority to distribute funds to *satisfy the contracts* (see Miccosukee Pet. 18), the contention is without merit. The restriction on payment in Section 450j-1(b), the provision that is at issue in this case, is a required component of every ISDA contract the Secretary enters into. See 25 U.S.C. 450*l*(a) and (c). It was, moreover, incorporated into both contracts at issue here. See Miccosukee C.A. App. 69; Oglala C.A. App. 20. It thus governs the provision of funds under the ISDA contracts in this case.

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[4] Petitioners also ignore the canon of construction requiring that similar statutory phrases be interpreted similarly. In Sections 450j-1(a) and 450j(c)(2), Congress used the phrase "amount of funds provided" to refer to the amount of money the Secretary is required to pay under ISDA contracts. See pp. 8-9, *supra*. The obviously parallel phrase "provision of funds" logically should be given a similar construction.

3. Contrary to petitioners' assertions, the court of appeals' reading of Section 450j-1 of the ISDA accords with that of the only other court of appeals that has considered the limits imposed by Section 450j-1(b). In *Ramah Navajo School Board, Inc.* v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), the court of appeals explained:

> Congress clearly included [Section 405j-1(b)] to make evident that the Secretary is not required to distribute money [for ISDA CSCs] if Congress does not allocate that money to him under the Act. * * * Thus, if the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds.

87 F.3d at 1345.

Notwithstanding the clear language of that opinion, petitioners claim that it is not consistent with the decision below. In particular, they characterize *Ramah* as distinguishing between the Tribe's right to payment on the one hand, and the Secretary's authority to disburse money on the other. See Oglala Pet. 15-16; Miccosukee Pet. 20-21. The D.C. Circuit in *Ramah*, however, did not adopt that distinction. To the contrary, it held that, "if the money is not available, *it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it* to the funds." 87 F.3d at 1345 (emphasis added). And while the D.C. Circuit in *Ramah* also stated that Section 405j-1(b) does not "excuse the Secretary's obligation to follow the mandates of the statute," that assertion was made in rejecting the government's contention that the Secretary's *allocation* of funds *among* contracting tribal organizations, in the event of shortfalls like those here, was not judicially *reviewable*. 87 F.3d at 1345. Thus, the D.C. Circuit in *Ramah* nowhere held that the Secretary is legally

liable for breach of contract when reducing payments in response to an insufficient appropriation. Rather, that court simply rejected the claim that Congress "intended that any time Congress underfunds [the program] by even a small amount, the agency * * * has virtually unfettered (and unreviewable) authority to allocate [the appropriated funds] in any way the Secretary sees fit." *Ibid.*

Finally, petitioners' construction of *Ramah* is quite difficult to reconcile with the result the court of appeals ultimately reached in *Ramah* itself. There, the D.C. Circuit ultimately faulted the mechanism by which the Secretary had chosen to allocate reductions in CSC payments, and suggested that the Secretary consider a *pro-rata* reduction mechanism (like the one used here) instead. See 87 F.3d at 1348-1350. But if petitioners were correct that any CFCs not paid by the Secretary could be collected through litigation, see Miccosukee Pet. 16-17, the Secretary's initial allocation of funds among Tribes would have been of little moment; regardless of the initial allocation, any organization receiving less than full payment would (in petitioners' view) be entitled to collect the difference from the Judgment Fund in any event.

Oglala's reliance (Pet. 15) upon *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997), is similarly misplaced. As the court of appeals recognized here (Oglala Pet. App. A11), the Tenth Circuit, in its *Ramah* decision, was faced with an entirely different issue. In particular, the Tenth Circuit was required to decide whether it was proper, when calculating the direct cost base for self-determination contracts, to include state program funds. Nowhere did that decision purport to address the meaning of Section 450j-1(b), or

the propriety of adjusting indirect cost payments in response to Congress's refusal to appropriate funds.

Petitioners also err in contending (Miccosukee Pet. 27-28; Oglala Pet. 17-18) that the court of appeals' decision conflicts with prior decisions of the Federal Circuit and its predecessor in this area. Relying on *New York Airways, Inc.* v. *United States*, 369 F.2d 743 (Ct. Cl. 1966), petitioners contend that they are entitled to full funding and payment of their CSCs notwithstanding congressional appropriation limitations. See, *e.g.* Miccosukee Pet. 16 ("[A] failure by Congress to appropriate sufficient funds does not limit the government's liability to pay the amounts specified in the contract."). The *New York Airways* case, however, distinguishes itself. In that case, the government entered into a private contract that did not limit the plaintiff's right to payment in the event that Congress failed to appropriate sufficient funds. Applying the terms of the contract, the court held the government liable, since the government had validly entered into a contract that provided an unqualified obligation to pay. 369 F.2d at 748.

As the court of appeals observed here, the contract in *New York Airways* is different from the ISDA funding agreements at issue in this case. In *New York Airways*, the government had an unqualified contractual obligation; neither the statute authorizing the contract nor the contract itself limited the government's obligation to pay based on the availability (or unavailability) of appropriations. Unlike the *New York Airways* contract, the ISDA funding agreements incorporate provisions that condition funding on the availability of appropriations. See 25 U.S.C. 450*l*(c); Miccosukee C.A. App. 69; Oglala C.A. App. 20. Moreover, the statute authorizing the self-determination contracts expressly

conditions payment on the availability of appropriations. 25 U.S.C. 450j-1(b).

The remaining cases upon which Oglala relies (Pet. 17-18) are distinguishable for similar reasons. Those decisions address the relationship between the government's sovereign powers and its capacity to contract, such as where Congress enacts legislation that abrogates the government's pre-existing contractual obligations. See *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569, 1573 (Fed. Cir. 1997) (legislation affecting a prior fixed price agreement between the government and a provider of uranium enrichment services), cert. denied, 524 U.S. 951 (1998); *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996) (legislation altering prior accounting agreements between the government and financial institutions). Here, the government's appropriations legislation did not abrogate any pre-existing contractual obligations. Instead, both the ISDA funding agreements themselves and the statute that authorized them expressly anticipated the possibility of insufficient appropriations and provided that such an insufficiency would affect the amount of payments made. By funding CSCs up to the limit set by Congress, the Secretary both satisfied the requirements of the appropriations Acts and fulfilled his statutory and contractual obligations.

4. Petitioners rely heavily on congressional testimony and reports leading up to the passage of the ISDA to argue that the legislative history of the ISDA mandates that the government fully fund CSCs. Oglala Pet. 6-13; Miccosukee Pet. 13-17. Because the language of the ISDA is clear, the court of appeals properly rejected petitioners' attempt to rely on an imputed legislative intent. *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (Where "the statute's language

is plain, the sole function of the courts is to enforce it according to its terms.") (internal quotation marks omitted); *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991) (statutory text is the "best evidence" of congressional purpose). Moreover, the relevant legislative history shows that Congress sought to restrict the *Secretary's* discretion when Congress provided sufficient funds; they do not show that Congress sought to restrict its *own* authority to control the federal fisc by restricting appropriations, especially since the text of the Act and of the model contract shows that Congress preserved that latter power.

For similar reasons, the court of appeals properly rejected petitioners' invocation (see, *e.g.*, Oglala Pet. 13-14) of the Indian "Canon of Construction." That canon may be used to resolve ambiguities in treaties between the government and Indian Tribes; it cannot be used to create ambiguities that do not otherwise exist. See, *e.g.*, *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) (canon "does not permit reliance on ambiguities that do not exist").

5. Finally, to the extent that petitioners claim that they have been harmed by their reliance on an expectation that CSCs would be fully reimbursed, the court of appeals properly found that such reliance would not be reasonable. *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 59 (1984) (defining reliance as reasonable where "the party claiming the estoppel did not know nor should it have known" of the eventuality that arose). The court of appeals reasoned that the plain text of Section 450j-1(b) as well as the terms of the model contract, 25 U.S.C. 450*l*(c)—which condition funding on the availability of appropriations—negate any argument that reliance was reasonable. Miccosukee Pet. App. 12a; Oglala Pet. App. A12. Moreover,

this Court has refused to permit a claim of estoppel where the award sought "would be in direct contravention of the federal statute upon which" the plaintiff's "ultimate claim to the funds must rest." *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990). Accordingly, even if petitioners' reliance were reasonable, no recovery could be had.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OGLALA SIOUX TRIBAL PUBLIC SAFETY DEPARTMENT,

Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Table of Appendices	vi
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Bates v. United States, 522 U.S. 23 (1997) 3

Bath Iron Works Corp. v. United States, 20 F.3d 1567 (Fed. Cir. 1994) 5

Brown v. Gardner, 513 U.S. 115 (1994) 8

California Cosmetology Coalition v. Riley, 110 F.3d 1454 (9th Cir. 1997) 3, 4

Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992) 5

Detroit v. Detroit Citizen's Street R. Co., 184 U.S. 368 (1902) 1

Equal Employment Opportunity Comm. v. Commercial Office Products Co., 486 U.S. 107 (1988) 1

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) 9

Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) 7

Holy Trinity Church v. United States, 143 U.S. 457 (1892) 6

Cited Authorities

	Page
Jackson v. United States, 573 F.2d 1189 (Ct. Cl. 1978)	7
King v. St. Vincent's Hospital, 502 U.S. 215 (1991)	8
Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129 (1936)	4
Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)	8
New York Airways v. United States, 369 F.2d 743 (Ct. Cl. 1966)	7
Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997)	8
Ramah Navajo School Board, Inc. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996)	4
Robinson v. Shell Oil Co., 519 U.S. 337 (1997)	9
Shoshone-Bannock Tribes v. Shalala, 58 F. Supp. 2d 1191 (D. Or. 1999)	3, 4
United States v. Winstar Corp., 518 U.S. 839 (1996)	1
Wetsel-Oviatt Lumber Co., Inc. v. United States, 38 Fed. Cl. 563 (1997)	5

Cited Authorities

Page

Statutes:

20 U.S.C. § 1092(a)(1)(F) 3

25 U.S.C. § 450a(a) 8

25 U.S.C. § 450j-1(a) 4, 6, 7

25 U.S.C. § 450j-1(a)(1) 2, 5, 6

25 U.S.C. § 450j-1(a)(2) 1, 2, 5, 6, 8

25 U.S.C. § 450j-1(a)(3)(B) 6

25 U.S.C. § 450j-1(a)(5) 6

25 U.S.C. § 450j-1(b), Pub. Law § 100-472, § 106(b) 1, 3, 4, 7, 8

25 U.S.C. § 450j-1(f) 2, 3, 6, 7, 8

25 U.S.C. § 450j(c) 6

25 U.S.C. § 450*l*(c) 7

25 U.S.C. § 450*l*(c)(a)(2) 8

25 U.S.C. § 450*l*(c)(b)(4) 6, 7

25 U.S.C. § 1658 3

Cited Authorities

	Page
25 U.S.C. § 1658	3
31 U.S.C. § 1341(a)(1)(B)	5
49 U.S.C. § 1376(c)	7
Pub. L. 100-472	2, 3
United States Constitution:	
Art. I, § 9, cl. 7	5
Other Authority:	
S. Rep. 100-274	1

TABLE OF APPENDICES

Page

Appendix — Relevant Statutes 1a

The writ should be granted because a substantial question of statutory construction affecting major Indian policy and virtually every Indian tribe is at issue. Respondent and the court below misread the governing statute by failing to properly assess its language, purpose, and context.

1. The Government's position results in substantial unfairness to Indian contractors and ultimately leads to the disintegration of the Self-Determination program and policy. An amendment enacted because "[f]ull funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-determination is to succeed", S. Rep. 100-274 at 13, is now to be interpreted as permitting the agency, for want of a cyclical appropriation, to undermine the clear command in the amendment to "add contract support costs which shall consist of an amount for the *reasonable costs* which must be carried on to ensure compliance with the terms of the contract and prudent management", 25 U.S.C. § 450j-1(a)(2). (emphasis added) Even if the language in 25 U.S.C. § 450j-1(b) on which the Secretary relies were plain (which it is not), the outcome produced by his interpretation is so at odds with the evident Congressional intent as to require reversal of the decision below. *Equal Employment Opportunity Comm. v. Commercial Office Products Co.*, 486 U.S. 107, 120 (1988) (rejecting the more natural reading of statutory language because such an interpretation would lead "to absurd or futile results . . . plainly at variance with the policy of the legislation as a whole"); *Detroit v. Detroit Citizen's Street R. Co.*, 184 U.S. 368, 384 (1902) (rejecting as "hardly credible . . . the city's suggestion that the fare rate agreed on with railroad company, which 'amounted to a contract', would be 'subject to change from time to time' at the city's pleasure") (cited by Justice Breyer concurring in *United States v. Winstar Corp.*, 518 U.S. 839, 913 (1996)).

2. The Secretary's Response contradicts the express language of 25 U.S.C. § 450j-1(a)(2) and 450j-1(f) by assuming power to make after-the-fact reductions in the amounts required to be added for ISDA contract support. Contrary to the Secretary's assertion, the Court of Appeals' decision is *inconsistent* with the overall function of ISDA. By failing to recognize the obligation of the United States to pay the contract price for services already performed, as opposed to the Secretary's responsibility as an official not to pay the price in the absence of appropriations, the decision denies Oglala the mandated unqualified contract amount for contract support costs (CSF) which by definition constitute "the reasonable costs" necessary "to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-1(a)(2). In so doing, the decision places the contractor in a position less favorable than the Secretary would have occupied had be kept control. The Secretary is able to draw on other branches of his own agency as well as other federal agencies to administer the direct program defined in § 450j-1(a)(1). For example, his defense of this case is provided by the Justice Department. His facilities and motor vehicles are provided by the GSA. He does not need insurance because the federal government is a self insurer. Thus, CSF is both essential to make self-determination work and irrelevant to the Secretary when he operates the program. Without full contract support, Indian tribes cannot occupy the same position the Secretary does, which is the goal Congress sought to achieve through Pub. L. 100-472.

3. The Secretary ignores the plain language of the Act embodying the distinction between the United States' contract *obligation* to pay the contract price for CSF and the *Secretary's specific authority to pay* that obligation only from available appropriations. Had Congress intended to limit the United States' contractual liability to pay the "full amount of funds to which the contractor is entitled under subsection (a)",

25 U.S.C. § 450j-1(f), it knew how to do so. Attached as Appendix A are fifty statutes each of which contains clear, unambiguous language conferring authority on an agency to contract only to the extent of available appropriations. Several of these statutes appear in Title 25. For example, 25 U.S.C. § 1658 (no. 23) was reviewed by the same committees which reviewed Pub. L. 100-472 and enacted by the same Congress. The contrast in language between this statute (and the others in Appendix A) and § 106(b)'s proviso is dramatic. Use of different language implies different intent. *Bates v. United States*, 522 U.S. 23, 29 (1997); *California Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460 (9th Cir. 1997) ("We must presume Congress acts with deliberation rather than inadvertence when it drafts a statute.")

In *Cosmetology*, Congress had enacted amendments setting forth and defining a fair and equitable refund policy to be applied to schools receiving federal higher education assistance. The Secretary of Education then promulgated new regulations increasing the refunds required from schools. The situation in *Cosmetology* was strikingly parallel to ours. There, as here, the Secretary relied on a separate clause in the statute [20 U.S.C. § 1092(a)(1)(F)] dealing with disbursement as authority to modify the refund calculation clause. The court construed his action as an ultra vires usurpation of power to amend the statute: "... § 1092(a)(1)(F) is a distribution mechanism for the refund calculated elsewhere, in § 1091b(b)". 110 F.3d at 1460. The Court in *Shoshone-Bannock Tribes v. Shalala*, 58 F. Supp. 2d 1191, 1196 (D. Or. 1999), interpreting § 450j-1(b), the same provision at issue here, adopted the same reasoning in holding that the proviso does not alter the liability of the Government regarding CSF:

> The § 106(b) proviso addresses only the Secretary's duty to disburse funds which the

> Congress has made available to the Secretary to disburse. Regardless of agency appropriations, the § 106(b) proviso does not limit the defendants' obligation to fully fund self-determination contracts.

Unlike these decisions, the Court of Appeals' reading incorrectly fuses a contract amount provision (§ 450j-1(a)) with a disbursal proviso (§ 450j-1(b)) and thereby improperly amends the statute by giving the Secretary the authority to reduce the contract amount when all the express language directs is that he refrain from paying in the absence of appropriations. *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) (regulation which "operates to create a rule out of harmony with the statute [ ] is a mere nullity."). In this connection, the Secretary's reliance on *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) is misplaced. The quotation relied on is dicta and in any case is taken out of context. The full passage makes the same distinction between entitlement and distribution made in *Cosmetology* and *Shoshone-Bannock*:

> Given the mandatory terms of the Tribes' CSF entitlement under the Act, Congress clearly included the proviso not to excuse the Secretary's obligation to follow the mandates of the statute, but rather to make evident that the Secretary is not required to *distribute* money if Congress does not allocate that money to him under the Act . . .

RNSB v. Babbitt, at 1345. (emphasis added)

4. The assertion that Oglala's interpretation renders the proviso surplusage is untrue. The full sentence, read as a whole, protects non-contracting tribes. Further, the mere fact that Congress duplicates a statutory constraint already in

existence does not render the latter surplusage. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992) (redundancies across statutes are not unusual). The Appropriations Clause, Art. I, § 9, cl. 7, does not bar Congress from authorizing an agency to enter into a contract in advance of appropriations. *Wetsel-Oviatt Lumber Co., Inc. v. United States*, 38 Fed. Cl. 563, 570 (1997); *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994) (where the Forest Service lacks appropriations to pay contract debt, there exists the permanent judgment fund). Indeed, the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(B), contains an express exception allowing an officer or agent of the government to enter into contracts or assume obligations on behalf of the United States Government when "authorized by law". Finally, the argument that by signing a contract including the statutory language Oglala has somehow accepted the "subject-to-availability" construction proffered by the Secretary is, of course, absurd and begs the question, which is whether the statute as a whole including the contract support funding provisions allows for such a skewed construction.

6. In our unique context, where Congress has seen fit to limit an appropriation for a discrete category of funding representing the reasonable costs necessary to administer programs at levels authorized and mandated by the statute, the funding provisions for CSF must indeed be construed to authorize pre-appropriation contracts. The statute's language supports this view. Unlike direct program funding under subpart 450j-1(a)(1), subpart 450j-1(a)(2) contains no qualification or condition on the Secretary's duty to "add the amount required" for contract support to the contract. Thus, while the direct program level may fluctuate according to yearly appropriations [because those appropriations define the program base under subpart 1(a)(1), namely, the amount which "the Secretary would have otherwise provided for [his]

operation of the program"] CSF funds constitute an agreed percentage needed to properly manage that size program. By logic and definition this amount, once agreed upon, becomes an absolute, a stated proportion of the direct program called the indirect cost rate. While the statute (§ 450j-1(a)(1)) commands the Secretary to contract for the same direct program level he would have operated, any diminution in the amount of CSF funding (§ 450j-1(a)(2)) needed to operate that program inevitably leads to mal-administration and defeats the statutory purpose. The Secretary's reading simply recreates the very problem which led Congress to amend the statute in 1988 and again in 1994.

7. The Secretary selectively and inaccurately cites isolated provisions of the Act and thereby gives a false and inaccurate picture of its structure, content, and purpose. He ignores numerous provisions requiring stated amounts for CSF to be included in ISDA contracts: The Act guarantees that contract support costs are amounts a tribe "is *entitled* to receive"; that they are an "entitle[ment]" and are "*required to be paid*"; that they "*shall be added*" to the contract amount; that "*the Secretary shall add* to the contract the *full* amount of funds to which the contractor is entitled"; and that contract support costs *shall* consist of specified categories and "*shall* include" the various amounts determined under § 450j-1(a). 25 U.S.C. §§ 450j-1(a)(2); (a)(3)(B); (a)(5); (f); 450*l*(c)[¶(b)(4)] (emphasis added). By not assessing these provisions, the Secretary violates basic rules of statutory construction. *Holy Trinity Church v. United States*, 143 U.S. 457, 459, 463 (1892) (court must apply spirit of law and not letter if letter is not within the intention of its makers . . . "another guide to the meaning of a statute is found in the evil it is designed to remedy"). In any case, § 450j(c) merely permits multi-year terms in ISDA contracts and in that context addresses the reality that program levels cannot be predicted in advance of appropriations. Indeed, by focusing

on this one provision the Secretary violates the same rule (specific governs the general) he attempts to apply to the proviso in § 450j-1(b) compared with § 450j-1(a). As for the model contract, § 450*l*(c), the answer is that the provision in ¶1(b)(4) simply combines in one contract provision both the funding amount clauses of 450j-1(a) and the payment clause limitation in § 450j-1(b). (If the Secretary's reading were correct, there would be no need for the second sentence in § 450*l*(c)¶(b)(4).) Neither alone nor in context do either of these provisions remove or relax the Secretary's duty to execute contracts containing the contract prices mandated in § 450j-1(a) and 1(f) or the United States' resulting liability for them.

8. The Secretary incorrectly describes *New York Airways v. United States*, 369 F.2d 743 (Ct. Cl. 1966) as containing an unqualified contractual obligation [to pay]. "[N]either the statute authorizing the contract nor the contract itself limited the government obligation to pay based on the availability or unavailability of appropriations." (Response at 14). Yet section 406(c) of the Federal Aviation Act of 1958 (49 U.S.C. § 1376(c)) says:

> The Postmaster General shall make payments *out of appropriations* for the transportation of mail . . . The Board shall make payments of the remainder of the total compensation payable under this section *out of appropriations made to the Board for that purpose.*

(emphasis is original) *Id.*, at 745. Whether or not the contract included this language is immaterial since contracts with the federal government incorporate the law as it existed at the time the contract was made. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-385 (1947), cited in *Jackson v. United States*, 573 F.2d 1189, 1194 (Ct. Cl. 1978). The similarity of the statute in *N.Y. Airways* and § 450j-1(b) is striking.

The Secretary also describes the Indian canon of construction as applying only to "treaties". (Response at 16). That is not correct. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997), citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law . . . '[T]he canons of construction applicable to Indian law are rooted in the unique trust relationship between the United States and the Indians' (citing *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) . . . [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit (citations omitted)"). This rule has been incorporated into ISDA, 25 U.S.C. § 450*l*(c)(a)(2). In turn the existence of ambiguity turns not on narrow reading of the provision in question but on analysis of the context, purpose, and scheme in which the provision is found. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("meaning of statutory language, plain or not, depends on context"); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[a]mbiguity is a creature not of definitional possibilities but of statutory context").

The phrase "provision of funds" is no where defined. The different wording in most of § 106(b) which limits the circumstances in which the Secretary may reduce funding for ISDA contracts ["the amount of funds required by subsection (a) of this section shall not be reduced (except) (enumerated circumstances) . . ."], as well as the use of unqualified normative language in both § 450j-1(a)(2) and § 450j-1(f) together with the history of the Act, its amendments, and its stated purpose to "maximize Indian participation in the direction of educational as well as other Federal services to Indian communities" (25 U.S.C. § 450a(a)) all lead to the conclusion that "provision of funds" cannot be interpreted as the Secretary wishes. In any case,

Oglala's reading *is* reasonable. A provision may be plain in one section but ambiguous in another. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997). Thus, under the Indian canon the Court need not decide whether Respondent's construction is also reasonable; the threshold issue is whether Oglala's construction is reasonable. If it is, Oglala prevails.

In this case the Indian canon reinforces the outcome produced by the ordinary rules of construction. Oglala's interpretation accords with legislative history and purpose, and harmonizes and gives effect to all provisions and words of the statute. The Secretary's reading does not. By unauthorized administrative action, the Secretary removes the legal force of the mandatory CSF funding provisions from the Act and gives "provision of funds" a meaning far beyond what the literal text permits.

The Secretary's construction makes full ISDA funding problematic, uncertain, and whimsical. It creates internal inconsistency. It mandates a contract amount and then takes it back. In the eye of the concurrence below, the result is a "travesty". *Babbitt v. Oglala Sioux Tribal Public Safety Dept.*, 194 F.3d 1374, 1382 (Fed. Cir. 1999). If this inconsistency can be avoided it must be. "Congress could not have intended to 'paralyze with one hand what it sought to promote with the other'." *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 776 (1984).

CONCLUSION

For these reasons and the reasons set forth in the petition, the writ should be issued.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTES

1. 7 U.S.C. § 178n(c) ("Notwithstanding any other provision of this subchapter the authority to enter into contracts shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriations Acts.") (Pub. L. 95-592, § 16, Nov. 4, 1978, 92 Stat. 2534).

2. 8 U.S.C. § 1524(b) ("The authority to enter into contracts under this subchapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts.") (June 27, 1952, c. 477, Title IV, Ch. 2 § 414, as added Mar. 17, 1980, Pub. L. 96-212, Title III, § 311(a)(2), 94 Stat. 116).

3. 10 U.S.C. § 1076a(g) ("The authority of the Secretary of Defense to enter into a contract under this section for any fiscal year is subject to the availability of appropriations for that purpose.") (Added Pub. L. 99-145, Title VI, § 651(a)(1), Nov. 8, 1985, 99 Stat. 655).

4. 10 U.S.C. § 2350e(b) ("Authority under this section to enter into contracts shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.") (Added Pub. L. 101-189, Div. A, Title IX, § 932(a)(1), Nov. 29, 1979, 103 Stat. 1536).

5. 10 U.S.C. § 2632(b)(4) ("The authority under subsection (a) to enter into contracts under which the United States is obligated to make outlays shall be effective for any fiscal year only to the extent that the budget authority for such outlays is provided in advance by appropriation Acts.") (Pub. L. 96-125, Title VIII, § 807(a) to (c)(1), Nov. 26, 1979, 93 Stat. 949, 950).

6. 10 U.S.C. § 2780(a)(2) ("The authority of the Secretary to enter into a contract under this section for any fiscal year is subject to the availability of appropriations.") (Added Pub. L. 99-661, Div. A., Title XIII, § 1309(a), Nov. 14, 1986, 100 Stat. 3982).

7. 12 U.S.C. § 1715Z-1(i)(1) ("The aggregate amount of outstanding contracts to make such payments shall not exceed amounts approved in appropriation Acts . . . .") (June 27, 1934, c. 847, Title II, § 235, as added Aug. 1, 1968, Pub. L. 90-448, Title I, § 101(a), 82 Stat. 479).

8. 15 U.S.C. § 648(*l*) ("The authority to enter into contracts shall be in effect for each fiscal year only to the extent and in the amounts as are provided in advance in appropriations Acts.") (Pub. L. 85-536, § 2[21], as added Pub. L. 96-302, Title II, § 202, July 2, 1980, 94 Stat. 843).

9. 15 U.S.C. § 649b(h) ("The authority to enter into contracts shall be in effect for each fiscal year only to the extent or in the amounts as are provided in advance in appropriation Acts.") (Pub. L. 96-481, Title III, § 302, Oct. 21, 1980, 94 Stat. 2331).

10. 15 U.S.C. § 652(i) ("Any authority to enter contracts or other spending authority provided for in this section is subject to amounts provided for in advance in appropriations Acts.") (Pub. L. 85-536, § 2[25], as added Pub. L. 101-515, Title V, § 7, Nov. 5, 1990, 104 Stat. 2142).

Appendix

11. 15 U.S.C. § 656(i) ("The authority of the Administrator to enter into contracts shall be in effect for each fiscal year only to the extent and in the amounts as are provided in advance in appropriations Acts.") (Pub. L. 85-536, § 2[29], formerly § 2[28], as added Pub. L. 102-191, § 2, Dec. 5, 1991, 105 Stat. 1589) (renumbered and amended)).

12. 16 U.S.C. § 3208(a) ("No authority to enter into contracts or to make payments or to expend previously appropriated funds under this Act shall be effective except to the extent or in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 96-487, Title XIII, § 1321, Dec. 2, 1980, 94 Stat. 2487).

13. 16 U.S.C. § 284(i) ("No authority under this subchapter to enter into contracts or to make payments shall be effective except to the extent and in such amounts as provided in advance in appropriations Acts.") (Pub. L. 89-671, § 10, as added Pub. L. 97-310, Oct. 14, 1982, 96 Stat. 1458).

14. 16 U.S.C. § 429b-5(b) ("Notwithstanding any other provision of sections 429b to 429b-5 of this title, authority to enter into contracts, to incur obligations, or to make payments under sections 429b to 429b-5 of this title shall be effective only to the extent, and in such amounts as are provided in advance in appropriation Acts.") (Apr. 17, 1954, c. 1553, § 6, as added Oct. 13, 1980, Pub. L. 96-442, § 2, 94 Stat. 1887).

15. 16 U.S.C. § 3644 ("New spending authority or authority to enter into contracts provided in this chapter shall be

effective only to such extent, or in such amounts, as are provided in advance in appropriation Acts.") (Pub. L. 99-5, § 15, Mar. 15, 1985, 99 Stat. 15).

16. 20 U.S.C. § 2392 ("Any authority to make payments or to enter into contracts under this chapter [20 U.S.C.A. § 2301 et seq.] shall be available only to such extent or in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 88-210, Title III, § 312, as added Pub. L. 105-332, § 1(b), Oct. 31, 1998, 112 Stat. 3122).

17. 20 U.S.C. § 3475(b) ("Notwithstanding any other provisions of this chapter, no authority to enter into contracts or to make payments under this subchapter shall be effective except to such extent or in such amounts as are provided in advance under appropriation Acts.") (Pub. L. 96-88, Title IV, § 415, Oct. 17, 1979, 93 Stat. 685).

18. 21 U.S.C. § 1181 ("The authority of the Secretary to enter into contracts under this subchapter and subchapter V of this chapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.") (Pub. L. 92-255, Title IV, § 414, as added Pub. L. 96-181, § 9(a), Jan. 2, 1980, 92 Stat. 1314).

19. 22 U.S.C. § 2194a ("The authority of the Overseas Private Investment Corporation to enter into contracts under section 2194(a) of this title shall be effective for any fiscal year beginning after September 30, 1981, only

to such extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 97-65, § 5(b)(2), Oct. 16, 1981, 95 Stat. 1023).

20. 22 U.S.C. § 4609(c) ("Any authority provided by this chapter to enter into contracts shall be effective for a fiscal year only to such extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 98-525, Title XVII, § 1710, Oct. 19, 1984, 98 Stat. 2659).

21. 25 U.S.C. § 640d-11(d)(2) ("The authority of the Commissioner to enter into contracts for the provision of legal services for the Commissioner or for the Office of Navajo and Hopi Indian Relocation shall be subject to the availability of funds provided for such purpose by appropriation Acts.") (As amended Pub. L. 100-666, § 4(a), Nov. 16, 1988, 102 Stat. 3929).

22. 25 U.S.C. § 764(b) ("Provided, That no authority to enter into contracts or to make payments under this subchapter shall be effective except to such extent or in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 96-227, § 5, Apr. 3, 1980, 94 Stat. 319).

23. 25 U.S.C. § 1658 ("The authority of the Secretary to enter into contracts under this title shall be to the extent, and in an amount, provided for in appropriation Acts.") (Pub. L. 94-437, Title V, § 508, as added Pub. L. 100-713, Title V, § 501, Nov. 23, 1988, 102 Stat. 4824).

24. 25 U.S.C. § 1805 ("No authority to enter into contracts provided by this section shall be effective except to the

extent authorized in advance by appropriations Acts.") (Pub. L. 95-471, Title I, § 105, formerly § 104, Oct. 17, 1978).

25. 29 U.S.C. § 1581 ("Notwithstanding any other provision of this chapter, no authority to enter into contracts or financial assistance agreements under this chapter shall be effective except to such extent or in such amount as are provided in advance in appropriation Acts.") (Pub. L. 97-300, Title I, § 171, Oct. 13, 192, 96 Stat. 1354).

26. 29 U.S.C. § 2939(f) ("Notwithstanding any other provision of this chapter [29 U.S.C.A. § 2801 et seq.], the Secretary shall have no authority to enter into contracts, grant agreements, or other financial assistance agreements under this chapter except to such extent and in such amounts as are provided in advance in appropriations Acts.") (Pub. L. 105-220, Title I, § 189, Aug. 7, 1998, 112 Stat. 1051).

27. 38 U.S.C. § 1711(c)(2) ("The authority of the Secretary to enter into contracts under this subsection shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 96-22, Title II, § 202, June 13, 1979, 93 Stat. 54).

28. 38 U.S.C. § 1712A(e)(3) ("The authority of the Secretary to enter into contracts under this subsection shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.") (Added Pub. L. 96-22, Title I, § 103(a)(1), June 13, 1979, 93 Stat. 48, § 612A).

29. 38 U.S.C. § 1720C(e) ("The authority of the Secretary to enter into contracts under this section shall be effective for any fiscal year only to the extent that appropriations are available.") (Added Pub. L. 101-366, Title II, § 201(a)(1), Aug. 15, 1990, 104. Stat. 437, § 620c).

30. 38 U.S.C. § 1732(d)(1) ("The authority of the Secretary to enter into contracts and to make grants under this section is effective for any fiscal year only to the extent that appropriations are available for that purpose.") (Added Pub. L. 93-82, Title I, § 107(a), Aug. 2, 1973, 87 Stat. 184, § 632).

31. 42 U.S.C. § 238k ("The authority of the Secretary to enter into contracts under this chapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.") (July 1, 1944, c. 373, Title II, § 242, formerly Title V, § 514, as added Nov. 9, 1978, Pub. L. 95-632 § 11(e), 92 Stat. 3456, renumbered).

32. 42 U.S.C. § 241(b)(5) ("The authority of the Secretary to enter into any contract for the conduct of any study, testing, program, research, or review, or assessment under this subsection shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts.") (July 1, 1944, c. 373, Title III, § 301, 58 Stat. 691).

33. 42 U.S.C. § 300e-16(c) ("The authority of the Secretary to enter into contracts under subsections (a) and (b) of this section shall be effective for any fiscal year only to

such extent or in such amounts as are provided in advance by appropriation Acts.") (July 1, 1944, c. 373, Title XIII, § 1307, as added Nov. 1, 1978, Pub. L. 95-559, § 7(a), 92 Stat. 2134).

34. 42 U.S.C. § 300v-2(c) ("The authority of the Commission to enter into such contracts is effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts.") (July 1, 1944, c. 373, Title XVIII, § 1803, as added Nov. 9, 1978, Pub. L. 95-622, Title III, § 301, 92 Stat. 3440).

35. 42 U.S.C. § 702(a)(1) ("The authority of the Secretary to enter into any contracts under this subchapter is effective for any fiscal year only to such extent or in such amounts as are provided in appropriations Acts.") (Aug. 14, 1935, c. 531, Title V, § 502, as added Aug. 13, 1981, Pub. L. 97-35, Title XXI, § 2192(a), 95 Stat. 819).

36. 42 U.S.C. § 1437c(c)(1) ("The additional authority to enter into such contracts provided on or after October 1, 1980, shall be effective only in such amounts as may be approved in appropriation Acts.") (Pub. L. 96-399, Title II, §§ 201(a), 210, Oct. 8, 1980, 94 Stat. 1624, 1636).

37. 42 U.S.C. § 1437s(g) ("Any authority of the Secretary under this section to provide financial assistance, or to enter into contracts to provide financial assistance, shall be effective only to such extent or in such amounts as are or have been provided in advance in an appropriation Act.") (Sept. 1, 1937, c. 896, Title I, § 21 as added Feb.

5, 1988, Pub. L. 100-242, Title I, § 123, 101 Stat. 1842) (later redesignated and amended).

38. 42 U.S.C. § 2286h ("The authority of the Board to enter into contracts under this subchapter is effective only to the extent that appropriations (including transfer of appropriations) are provided in advance for such purpose.") (Aug. 1, 1946, c. 724, Title I, § 319, as added Sept. 29, 1988, Pub. L. 100-456, Div. A, Title XIV, § 1441(a)(1), 102 Stat. 2083).

39. 42 U.S.C. § 2394 ("The authority to enter into a contract under the preceding sentence with the Los Alamos School Board and with the county of Los Alamos, New Mexico, shall be effective with respect to a period before July 1, 1997, only to the extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 99-661, Div. C, Title I, § 3138(b)(1), Nov. 14, 1986, 100 Stat. 4066).

40. 42 U.S.C. § 4594 ("The authority of the Secretary to enter into contracts under this chapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.") (Pub. L. 91-616, Title VI, § 1604, as added Pub. L. 96-180, § 17, Jan. 2, 1980, 93 Stat. 1306).

41. 42 U.S.C. § 5671(a)(7)(B) ("New spending authority or authority to enter into contracts . . . shall be effective only to such extent and in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 93-415, Title II, § 299 formerly § 261, Sept. 7, 1974, 88 Stat. 1129).

42. 42 U.S.C. § 7256(b) ("Notwithstanding any other provision of this subchapter, no authority to enter into contracts or to make payments . . . shall be effective except to such extent or in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 95-91, Title VI, § 646, Aug. 4, 1977, 91 Stat. 599).

43. 42 U.S.C. § 7923 ("The authority under this subchapter to enter into contracts or other obligations requiring the United States to make outlays may be exercised only to the extent provided in advance in annual authorization and appropriation Acts.") (Pub. L. 95-604, Title I, § 113, Nov. 8, 1978, 92 Stat. 3031).

44. 42 U.S.C. § 8274 ("Authority under this part to enter into acquisition contracts shall be only to the extent as may be provided in advance in appropriation Acts.") (Pub. L. 95-619, Title V, § 565, Nov. 9, 1978, 92 Stat. 3281).

45. 42 U.S.C. § 9662 ("Any authority provided by this Act, including any amendment made by this Act, to enter into contracts to obligate the United States or to incur indebtedness for the repayment of which the United States is liable shall be effective only to such extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 99-499, § 3, Oct. 17, 1986, 100 Stat. 1614).

46. 42 U.S.C. § 12377(a) ("New spending authority or authority to enter into contracts as provided in this subchapter shall be effective only to the extent and in such amounts as are provided in advance in

appropriations Acts.") (Pub. L. 101-501, Title IX, § 988, Nov. 3, 1990, 104 Stat. 1283).

47. 48 U.S.C. § 1933(j)(3) ("No authority under this subsection to enter into contracts or to make payments shall be effective except to the extent and in such amounts as provided in advance in appropriations Acts.") (Pub. L. 99-658, Title I, § 104, Nov. 14, 1986, 100 Stat. 3675).

48. 49 U.S.C. § 103(e) ("Notwithstanding any other provision of this chapter, no authority to enter into contracts or to make payments under this subsection shall be effective, except as provided for in appropriations Acts.") (Pub. L. 103-440, Title II, § 216, Nov. 2, 1994, 108 Stat. 4624).

49. 50 App. U.S.C. § 1989b-8 ("No authority under this title . . . to enter into contracts or to make payments shall be effective in any fiscal year except to such extent and in such amounts as are provided in advance in appropriations Acts.") (Pub. L. 100-383, Title I, § 109, Aug. 10, 1988, 102 Stat. 910).

50. 50 App. U.S.C. § 1989c-7 ("No authority under this title . . . to enter into contracts or to make payments shall be effective in any fiscal year except to such extent and in such amounts as are provided in advance in appropriations Acts.") (Pub. L. 100-383, Title II, § 208, Aug. 10, 1988, 102 Stat. 916).